SUPREME COURT OF THE UNITED STATES.

No. 205.

JOHN G. HANSBROUGH AND WILLIAM T. HARDIN, APPELLANTS,

vs.

PHILIP F. W. PECK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States of America within and for the northern district of Illinois, in chancery, sitting at the city of Chicago, in said district, before the Hon. Thomas Drummond, judge of the district court of the United States for the northern district of Illinois, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Thursday, the ninth day of June, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

JOHN G. HANSBROUGH AND WILLIAM T. HARDIN
vs.
PHILIP F. W. PECK. } Chancery.

Be it remembered, that on the twenty-third day of August, in the
2 year of our Lord one thousand eight hundred and sixty-two, John G. Hansbrough and William T. Hardin, complainants, by their solicitors, Messrs. Arrington and Dent, came into the clerk's office of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, and filed their bill of complaint against Philip F. W. Peck, defendant, and also at the same time filed their bond for costs and præcipe in said entitled cause, which said bond for costs and also said bill of complaint and præcipe are in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Circuit court of the United States for said district, October term, A. D. 1862.

JOHN G. HANSBROUGH AND WILLIAM T. HARDIN
vs.
PHILIP F. W. PECK. } In chancery.

3 I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiffs of any cost ordered or adjudged to be paid by them, I hereby agree and stipulate that execution may issue against my property for any costs taxed against them. Dated this twenty-second (22) day of August, A. D. 1862.

L. D. BOONE.

Endorsed: Filed August 23d, A. D. 1862.

WM. H. BRADLEY, *Clerk.*

Bill of complaint.

To the judges of the circuit court of the United States for the northern district of Illinois:

John G. Hansbrough and William T. Hardin, who are citizens of the State of Kentucky, bring this their bill against Philip F. W. Peck, of Chicago, and a citizen of the State of Illinois.

4 And thereupon your orators complain and say that on or about the 30th day of October, A. D. 1856, your orators entered into an agreement with said Philip F. W. Peck, for the purchase from him of the following described real estate situated in the county of Cook and State of Illinois, to wit: lots eight, (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,)

thirteen, (13,) and fourteen, (14,) in block one hundred and sixteen, (116,) in that part of the city of Chicago known as the school section addition to Chicago, for the sum of ninety-three thousand dollars, the same being at the rate of five hundred dollars per foot front on Clark street, and thereupon paid him two thousand dollars, part of said purchase money, for which last-named sum he gave them a receipt; that they, at the same time, purchased from him two certain wooden houses and a barn, situated on said premises, for the sum of three thousand dollars, which was to be thereafter paid.

That afterwards, on the 29th day of January, A. D. 1857, your orators paid said Peck the further sum of eight thousand dollars upon said
5 purchases, including said contract price for said houses and barn, and surrendered to him said receipt; that he thereupon executed with your orators certain articles of agreement for the sale and conveyance by him to your orators of said property, which said articles were in two parts, signed cotemporaneously, a copy of which articles is hereto attached, marked Exhibit A, to be taken as part hereof; and your orators, for greater certainty, crave leave to refer to one of the original copies of said articles to be produced by them.

Your orators show, also, that the whole amount of principal due upon said purchases at the time of the giving of said contract was eighty-six thousand dollars, after deducting the payments aforesaid, which said sum of eighty-six thousand dollars was payable on the 28th day of April, 1861; that said articles provided, among other things, that the consideration to be expressed in the deed which might be given for the premises should be ninety-three thousand dollars, and that in case default should be made in the payment of any or either of the notes in said articles specified and hereinafter mentioned, or any part thereof, for thirty days after the same should become due,
6 said agreement should be void and no longer binding, at the option of said Peck, his representatives or assigns, or at his or their election might be enforced.

That the said Peck, corruptly, usuriously, and contrary to the statutes in such case made and provided, exacted and reserved interest on said sum of eighty-six thousand dollars at a greater rate than six per centum per annum for the time the same was to run.

That it was on said 29th day of January, A. D. 1857, at the county of Cook, in the State of Illinois, corruptly, usuriously, and contrary to the statutes in such case made and provided, agreed by and between said Peck and your orators that your orators, for the forbearance to them of said sum of eighty-six thousand dollars from that time until the 28th day of April, A. D. 1861, should pay him, the said Peck, or his assigns, interest on said sum at a greater rate than six per centum per annum, that is to say, at the rate of ten per centum per annum; that said corrupt, usurious, and unlawful agreement was consummated by the aforesaid articles or contract
7 of January 29th, 1857, executed by said Peck and your orators, and also by the giving of certain notes of your orators, as specified in said agreement, to wit: one note for $4,300, payable April 28th, 1857; one note for $4,300, payable October 29th, 1857; one note for $4,300, payable April 28th, 1858; one note for $4,300, payable October 29th, 1858; one note for $4,300, payable April 28th, 1859; one note for $4,300, payable October 29th, 1859; one note for $4,300, payable April 28th, 1860; one note for $4,300, payable October 29th, 1860; one note for $4,300, payable April 29th, 1860; and one note for $90,300, payable April 28th, 1861.

That said last-mentioned note included the principal, with interest thereon for six months; that said first-mentioned note was designed to be, and in fact was given, for interest at said rate upon said sum of $86,000 from the 30th day of October, A. D. 1856, to the 28th day of April, A. D. 1857.

That the sole consideration of said notes was as above stated; that the same were not, nor was any thereof, given for money loaned.

That your orators afterward paid said Peck the full amount of four of said notes, to wit, those made payable April 28th, 1857, October 29th,
8 1857, April 28th, 1858, October 29th, 1858, and over two thousand dollars on the note so made payable April 28th, 1857, and from time to time further large sums of money for additional interest upon moneys mentioned in the said contract of January 29th, 1857, for forbearing and giving day of payment of such moneys for certain periods after the time fixed by the notes aforesaid for the payment of said moneys, of which said additional interest a large sum, to wit, two thousand dollars, was an excess of interest over and above the rate of six per centum per annum, and a large sum, to wit, one thousand dollars, was for an excess of such interest over and above the rate of ten per cent. per annum.

That some time after the making of said contract your orators were let into the possession of the premises aforesaid; that they afterwards removed the houses aforesaid to more advantageous sites upon said premises, and improved and repaired the same, and erected and built upon said premises a block of frame houses, extending across the whole front of the property from Quincy street to Jackson street, in the city of Chicago, at a cost of eighteen thousand dollars; that your orators expended other large
9 sums of money in improving said property, making sidewalks in front of the same and paying taxes and assessments upon the premises, the whole amounting to a large sum, to wit, forty-eight hundred dollars; that the improvements aforesaid, so made by your orators, were lasting and permanent, and enhanced the premises in value to the amount of at least twenty-two thousand and eight hundred dollars; that your orators held possession of said premises until on or about the 13th day of April, 1861; that the value of the ground-rent of said premises during the time they were so held by your orators did not exceed the sum of fifteen hundred dollars per annum.

That in fact the aforesaid contract for the purchase of said real estate was hard and unconscionable as against your orators, and that it was therefore wholly out of their power to complete the payment of the moneys thereby required to be paid; and the same was rendered still more oppressive by a destructive fire, which on or about the 4th day of January, A. D. 1858, destroyed the buildings your orators had erected, on said Clark street as aforesaid, which buildings, then rebuilt for your orators, could not be replaced for six months thereafter, and also by the principal business street
10 adjoining said property, viz., Clark street, being rendered almost entirely useless to the public in the course of the improvement of the same by the city of Chicago, at the expense of your orators and adjoining proprietors in raising and paving said street during the period of one year commencing some time in the fall of 1858.

That on or about the tenth day of April, A. D. 1861, the said Philip F. W. Peck filed his certain bill of complaint in the circuit court of Cook County aforesaid, on the chancery side of said court, against your orators and Martin Ryerson and William Hansbrough, to prevent the removal of the buildings and improvements aforesaid, or some of the same, from said premises; and to get possession of said premises, and to have a receiver appointed to collect the rents and profits and to put an end to the aforesaid contract of sale, and restore the said Philip F. W. Peck to the possession of the premises; that in and by said bill the said Peck admitted the payment of about $28,932 upon said contract, and averred that he had declared the contract forfeited and at an end by reason of the non-payment of other moneys before then due on the same; that such proceedings were had in the

11 suit; that on or about the 13th day of April, A. D. 1861, a receiver of such rents and profits was appointed, and thereafter collected the same until a decree was made as hereinafter stated; that on or about the 26th day of May, A. D. 1862, a decree was made in said cause by said court then judicially sitting, in and by which decree said receiver was required to account to said Philip F. W. Peck for all rents received by said receiver, and to pay the same over to said Peck.

Said decree also recited that the buildings put upon the premises by your orators and the improvements made by your orators had become fixtures to the realty. And said court further considered and adjudged, among other things, that the said Peck should have full, complete, exclusive, and absolute possession of said premises, with all the same rights of ownership and estate as were vested in him over the premises before the same were sold to your orators, and that the aforesaid articles of agreement of January 29th, 1857, were to be held in relation to the title of the premises aforesaid as of no effect and void as against said Philip F. W. Peck, his heirs, executors, administrators, or assigns, or

12 any person or persons claiming by, through, or under them, or any of them, and also as to said defendants in said suit. A copy of said decree is hereto attached, marked Exhibit B, to be taken as a part hereof.

And your orators further show that the said Philip F. W. Peck has declared the aforesaid agreement of January 29th, 1857, null and void and no longer binding upon him by reason of your orators, from their inability, having failed to complete the payment which, as above specified, fell due October 29th, 1859, and also by reason of your orators from such inability having failed to make other payments falling due under said contracts at later periods as above specified; and also he, the said Peck, claims that all the moneys paid upon said contract by your orators as above stated have upon his election been forfeited to him, and that he has thereby become entitled to the same.

And your orators further show that the said Philip F. W. Peck has since the 26th day of May, A. D. 1862, been in the full, quiet, and peaceable enjoyment of the premises aforesaid, and has appropriated to himself the buildings and improvements put thereon by your orators as aforesaid, and

13 claims that the contract of sale made by him as aforesaid has been completely rescinded and ended, and refuses to refund to your orators the money paid on said contract, and also refuses to allow your orators anything for said buildings or improvements, and also retains the notes of your orators, which, as above stated, were to mature April 28th, 1859, October 29th, 1859, April 28th, 1860, October 29th, 1860, and April 28th, 1861, and neglects and refuses to surrender the same to your orators.

Your orators further show that Martin Ryerson has claimed an interest in some of the buildings aforesaid, but has heretofore released the same to your orator, John G. Hansbrough. Also that Lemuel W. Smith, W. T. Hardin, and J. L. Caldwell heretofore claimed an interest in a part of the premises aforesaid as assignees of your orator John G. Hansbrough, but have released the same to your said orator.

Your orators further show that said contract for the purchase of said real estate became and was so intolerably oppressive that in the month of November, 1859, or about that time, they proposed a relinquishment of the same unless it should be modified or made less rigorous and exacting.

14 That said Peck thereupon proposed to them that if they would not abandon the same, but would pay certain, taxes, assessments, and charges, and interest then accrued, the whole amounting to ten thousand dollars, within sixty days from the first day of December, 1859, he would thereafter so accommodate and indulge them that they could carry on said

contract, and to this end he would, until there should be a revival of trade and business in Chicago, take the net income from the property over and above taxes and insurance, in lieu of interest on the purchase money, until such revival of trade and business. That your orators accepted said proposition of said Peck, and in accordance with his request, in order to comply with said proposition, sent an agent from the State of Kentucky to reside in Chicago aforesaid, to take charge of the property and collect and get in the rents and pay the same to said Peck, less the taxes and insurance. And also your orators, on or about the 31st day of January, A. D. 1860, paid said taxes, assessments, and other charges, and accrued interest, the whole amounting to ten thousand dollars as aforesaid, in compliance with
15 his said proposition, and thereafter were ready and willing, and from time to time offered to pay said Peck the net income from the premises after deducting the taxes and insurance as aforesaid; but he, the said Peck, declined to carry out or abide by his said proposition, and thereafter continued to enforce said contract of January 29th, 1857, and all its provisions, with the most exacting rigor, notwithstanding there was no considerable increase of income from the property nor a revival of trade and business in Chicago. And your orators charge that said Peck obtained from them seven thousand dollars and upwards, part of said ten thousand dollars, upon the pretence aforesaid, with the fraudulent design to declare a forfeiture at the earliest practicable period, and thereby hold as forfeited to himself such money, with all moneys paid under said contract.

Your orators charge and submit that in equity they should be relieved from the forfeiture so as aforesaid claimed by said Peck under one of the above-recited clauses in said articles of agreement, bearing date January 29th, 1857, in respect to moneys paid under said agreement; that the said Philip F. W. Peck should refund to your orators said moneys paid him on the contract of sale aforesaid as above stated; that he should also
16 pay your orators for the aforesaid lasting and valuable improvements made by your orators on the premises in said contract described; and also especially that the said Peck should repay and refund to your orators so much of the moneys paid him as above stated as was for interest at a greater rate than six per centum per annum, which excess over and above that rate amounts to a large sum of money, to wit, seven thousand and six hundred dollars, besides the excess of interest paid as above stated for forbearing the payment of the notes of your orators after the maturity thereof, according to said articles of agreement of January 29th, 1857.

And your orators charge and insist that it is contrary to equity and good conscience that the said Peck should retain the moneys paid to him by your orators as aforesaid, or retain the usurious interest paid him as aforesaid, or appropriate without compensation to your orators the improvements made by your orators upon the premises aforesaid. But so it is, may it please your honors, your orators cannot have relief in the premises at and by the strict rules of the common law, but only through the aid of a court of equity, in which matters of this sort are properly cognizable and relievable.

17 To the end, therefore, that said defendant, Philip F. W. Peck, may, if he can, show why your orators should not have the relief hereby prayed, and may, not under oath, (the necessity of which is waived,) but according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the following interrogatories, to wit:

1st. Whether or not the said Peck received from your orators the sum of two thousand dollars on account of the purchase price of the premises above described, on or about the 30th day *day* of October, A. D. 1856.

2nd. Whether or not said purchase price was estimated at five hundred dollars per foot front of the property on Clark street.

3rd. Whether or not the sum of ninety-three thousand dollars was the purchase price agreed upon for the ground, exclusive of the sum agreed to be paid for the buildings on the premises.

4th. Whether or not he executed the agreement of January 29th, 1857, above specified.

18 5th. What moneys have been paid by your orators under said agreement; how much of principal and how much of interest.

6th. What part of the sum of $134,700 stated in the aforesaid articles of agreement of January 29th, 1857, was for interest, and upon what sum and for what time or times or periods such interest was computed.

And that your orators be relieved from the forfeiture insisted upon by said Peck under said contract so far as to be restored to what they have lost thereby and paid thereon as above stated, and that your orators may recover of said Peck the moneys paid him by your orators as aforesaid, and that they may also be paid for the lasting and valuable improvements by them made upon the premises aforesaid, and may also recover of the said Philip F. W. Peck the usurious interest by them paid him as aforesaid, and that he be required to deliver up the notes of your orators by him held as above stated, and that your orators may have such other or further relief as in equity shall seem meet.

May it please your honors that process of subpœna in chancery,
19 according to the course and practice of this honorable court, be issued herein, requiring the said Philip F. W. Peck to appear and answer this bill, &c.

And your orators, as in duty bound, will ever pray, &c.

JOHN G. HANSBROUGH,
WILLIAM T. HARDIN,
By ARRINGTON & DENT,
Their Solicitors and Counsel.

Exhibit A.

Articles of agreement, made and concluded this twenty-ninth day of January, in the year one thousand eight hundred and fifty-seven, between P. F. W. Peck, of the city of Chicago and State of Illinois, party of the first part, and John G. Hansbrough and Wm. T. Hardin, of Shelby County and State of Kentucky, party of the second part, witnesseth, that the party of the first, at the request of the party of the second part, and in consideration of the money to be paid and the covenants as herein expressed, to be per-
20 formed by the party of the second part, (the prompt performance of which payments and covenants being a condition precedent, and time being the essence of said condition,) hereby agree to sell to the said party of the second part all those certain lots and parcels of lands situate in Chicago, in the county of Cook and State of Illinois, known and designated as lots eight, (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,) thirteen, (13,) and fourteen, (14,) in block one hundred and sixteen, (116,) in that part of the city of Chicago known as the school section addition to Chicago, together embracing all the distance between the south line of Quincy street and the north line of Jackson street, fronting Clark street in said block of land, being one hundred and eighty-six (186) feet, more or less, front, and with the privileges and appurtenances thereto belonging. And the said party of the second part, in consideration of the premises, hereby agreed to pay the said party of the first part, his or their executors, administrators, or assigns, at his office or other place he may designate in the city of Chicago, the sum of one hundred and thirty-four thousand seven hundred dollars, ($134,700,)
21 as follows, viz: two thousand dollars paid October 30th, 1856, as per said Peck's receipt therefor, $2,000; and eight thousand dollars cash this

day, the receipt whereof is hereby acknowledged, $8,000; and said Hansbrough and Hardin have executed to said Peck nine promissory notes of even date herewith, and which are intended to be secured hereby, viz:

One note of forty-three hundred dollars, payable.	
One note of forty-three hundred dollars, payable Apr. 28, A. D. 1857	$4, 300
One note of forty-three hundred dollars, payable Oct. 29, A. D. 1857	4, 300
One note of forty-three hundred dollars, payable Apr'l 28, A. D. 1858	4, 300
One note of forty-three hundred dollars, payable Oct. 29th, A. D. 1858	4, 300
One note of forty-three hundred dollars, payable Apr'l 28, A. D. 1859	4, 300
One note of forty-three hundred dollars, payable Oct. 29, A. D. 1859	4, 300
One note of forty-three hundred dollars, payable Apr'l 28, A. D. 1860	4, 300
One note of forty-three hundred dollars, payable Oct. 29, A. D. 1860	4, 300
One note of ninety thousand three hundred dollars, payable April 28, A. D. 1861	90, 300
	134, 700

And also that he will well and faithfully in due season pay or cause to be paid all ordinary taxes assessed for revenue purposes upon the premises, or any part thereof, subsequent to the year 1855, and also all other assessments which now or may be hereafter charged or assessed upon or against said premises or any part thereof. But in case the said party of the second part fail to pay any or all such taxes or assessments upon said
22 premises or appurtenances or any part thereof whenever and as soon as the same shall become due and payable, and the party of the first shall pay from time to time, or at any time, any or all such taxes or assessments, or cause the same to be paid, the amount of any and all such payments so made by the party of the first part shall immediately thereupon become an additional consideration, and payment to be made by the party of the second part hereto for the premises herein agreed to be conveyed.

And the said party of the first part further covenants and agrees with the said party of the second part that upon the faithful performance by said party of the second part their undertaking in this behalf, and of the payment of said notes above mentioned, in the manner specified, he, the said party of the first part, shall and will, without delay, well and faithfully execute, acknowledge, and deliver in person or by attorney duly authorized to the party of the second part, their heirs or assigns, a deed of conveyance of all the right, title, and interest of the party of the first part of, in, and to the above-described premises, with the appurtenances, with cove-
23 nants of warranty against any act or thing done or suffered by the party of the first part.

And it is mutually covenanted and agreed, by and between the parties hereto, that in case default shall be made in the payment of any or either of said notes, or any part thereof, at the time or any of the times above specified for the payment thereof and for thirty days thereafter, this agreement, and all the preceding provisions hereof, shall be null and void and no longer binding, at the option of said party of the first part, his represen-

tatives or assigns, and all the payments which shall have been made hereon or thereon, or in pursuance hereof, absolutely and forever forfeited to the said party of the first part; or, at the election of the said party of the first part, his representatives and assigns, the covenants and liability of said party of the second part shall continue and remain obligatory upon the said party of the second part, and may be enforced, and the said consideration money and every part thereof, with the annual interest, as above specified, be collected by proper proceedings in law or equity from the said party of the second part, their heirs, executors, administrators, or assigns.

And it is further mutually covenanted and agreed, by and between the parties hereto, that in case of default in the payments stipulated to be made by the said party of the second part, or any part thereof, and the election of the party of the first part, his representatives or assigns, to consider the foregoing contract of sale at an end, and prior payments forfeited, the said party of the second part, their heirs, representatives, or assigns, who may have possession or the right of possession of said premises at the time of such default, or at any time thereafter, shall be considered, and are hereby agreed and declared to be in law and equity, the tenant or tenants at will of said party of the first part, his representatives and assigns, on a rent equal to an interest of ten per cent. per annum on the whole amount of the purchase money above specified, payable quarter-yearly from the day of such default in payment of any or either of said notes or any part thereof. And after such default in payment and election to consider the above contract of sale as void, the said party of the first part, his representatives and assigns, shall and may have and exercise all the powers, rights, and remedies provided by law or equity to collect such rent, or to remove such tenant or tenants, the same as if the relation of landlord and tenant hereby declared were created by an original absolute lease for that purpose on a special rent, payable quarterly on a tenure at will, and that in such case the said tenant or tenants shall and will pay or cause to be paid all taxes, assessments, ordinary and extraordinary, which may be laid or assessed on such premises, or any part thereof, during the continuance of such tenancy, and will not commit or suffer any waste or damage to said premises or the appurtenances, but will keep, and deliver on the termination of such tenancy, the said premises and appurtenances in as good order and repair (ordinary wear and decay and unavoidable injury by the elements excepted) as they were in at the commencement of such tenancy.

In witness whereof, the party of the first part and the party of the second part, in their own proper person, have hereinto respectively set their hands and seals on the day and year first above written. Done in duplicate.

P. F. W. PECK. [SEAL.]
JOHN G. HANSBROUGH. [SEAL.]
WM. T. HARDIN. [SEAL.]

Signed, sealed, and delivered in presence of—
JAMES LONG.

I agree to pay one half of the city and county taxes on the aforesaid real estate for A. D. 1856.

P. F. W. PECK.

It is hereby further agreed by the parties to the aforegoing agreement, and this is made a part thereof, that the consideration and measure of damages to be assessed in any deed hereafter which may be given of said premises shall be ninety-three thousand dollars; and this and the aforegoing agreement is made to carry into effect and merges the original agreement for said premises, dated October 30th, A. D. 1856, and which said original agreement is hereby cancelled.

It is further agreed that if the notes mentioned in the aforegoing agreement are not severally paid within the thirty days therein specified after they severally become due, the right to collect the same or either of them
27 at the maturity thereof, specified in and by said notes for the payment thereof shall not in any way be impaired by any constructions of said agreement. But no forfeiture of said premises, or of money paid on account thereof, shall be made or claimed until thirty days after either or any of said notes become due as specified to be due in and by said notes; but the highest legal rate of interest shall be paid thereon, or on the amount thereof deferred for all the time taken to pay the same within the thirty days aforesaid. Said P. F. W. Peck hereby reserves to himself the possession of the premises, buildings, and appurtenances described and included in the aforegoing agreement, (excepting the building on the southwest corner of Clark and Quincy streets,) until May 1st, A. D. 1857, and said Peck hereby agrees to pay said Hansbrough and Hardin, as rent for the use of the premises first described and reserved as aforesaid, at the rate of eight hundred dollars per annum, from November 1st, A. D. 1856; and also to account and pay to them, as rent for the said building, corner of Clark and Quincy streets, at the rate of six hundred dollars per annum out of the rents collected
28 thereon, from November 1st, A. D. 1856, and also for the to accrue thereon at the rate last mentioned, whenever collected, up to May 1st, A. D. 1857. It is understood that all gas fixtures and chimney fixtures, including mantles, belonging to said premises, are reserved to and by said Peck.

In witness whereof, the aforesaid parties have hereunto respectively set their hands and seals this 29th day of January, A. D. 1857.

(Duplicate.)

P. F. W. PECK. [SEAL.]
JOHN G. HANSBROUGH. [SEAL.]
WM. T. HARDIN. [SEAL.]

Exhibit B.—Decree.

Circuit court of Cook County.

PHILLIP F. W. PECK
vs.
JOHN G. HANSBROUGH, WILLIAM T. HARDIN, MARTIN Ryerson, and William Hansbrough. } In chancery.

29 And now, at this day, comes again the complainant by his solicitors, Hoyne, Miller, and Lewis; and the said defendants, by Walker, Van Arman, and Dexter and W. A. Arrington, their counsel, also come; and the said cause being called on for hearing upon the bill, answer, exhibits, and proof, as well as the depositions of witnesses taken therein, and the court being now fully advised in the premises, doth order, adjudge, and decree:

First. That the injunction heretofore issued on the twelfth day of April, 1861, in accordance with the prayer of the conplainants' said bill, upon the order of the judge of this court, restraining and enjoining all said defendants as is in writ of injunction commanded, be, and the same is hereby, made perpetual, and the said defendants, and each and every of them, their heirs, executors, administrators, assigns, agents, and attorneys, and all other persons or person claiming by, through, or under them or any of them, and their assigns, are hereby perpetually enjoined, restrained, and commanded from
30 removing off the premises described in said bill of complaint as those certain lots eight, (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,) thirteen, (13,) and fourteen, (14,) of block one hundred and sixteen (116)

of the school section addition to Chicago, or any part thereof, any shed, building, tenement house, or any other erection or improvement whatsoever erected and now being, standing, or situated or standing upon the same, or from in any manner altering or attemping to alter or change the same, or any part thereof, and from collecting any monies, rents, issues and profits, or any part thereof, issuing out of and from said premises, or arising out of any agreement, lease, contract, or holding whatsoever made or existing upon account of said premises by any of said defendants, or any money to become due and payable from any person or persons, tenants or others, or any holding or occupation of the premises aforesaid, or any agreement in relation thereto with said defendants, but that from and after filing of said bill of complaint the same shall be paid and payable to said complainant, he of right being entitled thereto; and the said defendants are forever
31 debarred from any and all rights of, in, and to the possession or any right of possession, or any interference whatsoever with the possession or occupancy of said premises by the said complainant, his heirs, executors, and administrators forever; and all and every person or persons, now in possession as a tenant of said premises, or who was such a tenant at the time of filing said bill of complaint, shall be discharged of his obligations as such upon payment made to said complainant, and not otherwise; and said complainant is hereby declared to be entitled, as rightful owner of the premises aforesaid, to be the only person lawfully entitled to recover and collect all such money or demand upon the premises as may be due or become due as aforesaid. And it is also ordered, adjudged, and decreed that the receiver appointed by order of this honorable court, William L. Greenleaf, do forthwith make up and render his accounts of all monies collected and expended by him on account of sa id premises since his appointment, showing what balance of money remains in his hands, so that the same may be passed upon by this court. And it appearing to the court that complainant is en-
32 titled to receive such balance if any, the said receiver is hereby ordered and directed to pay over such balance of money to the complainant or his solicitor, taking the proper vouchers or receipts therefor, and that upon such payments made and vouchers filed in this case the said receiver stand discharged of his bond as receiver, and his securities and the bond be vacated and stand for nought.

And further, it now appearing that said defendants John G. Hansbrough and William T. Hardin had become the purchasers of said lots, eight (8,) nine, (9,) ten, (10,) eleven, (11,) twelve, (12,) thirteen, (13,) and fourteen (14,) of block one hundred and sixteen, (116,) of the school section addition to Chicago by articles of agreement dated 29th day of January, A. D. 1857, as referred to and made an exhibit of said complainant's bill for a consideration of purchase money of the sum of one hundred and thirty four thousand seven hundred dollars, payable in instalments at the times named therein, under which, as vendees of said premises, the said defendants Hansbrough and Hardin entered and took possession, erecting on the premises and land described sundry and divers tenements, buildings, stores, and im-
33 provements, which had become fixtures to the realty, incapable of detachment or removal by said vendees without consent of said complainant or the payment of said purchase money; and said defendants John G. Hansbrough and William T. Hardin having made default in sundry payments of said purchase money under said articles of agreement, besides the payment of taxes and assessments due thereon; and they having wholly failed in said defaults to perform said contracts or agreement as alledged in said complainant's bill of complaint, and in all things relating to said payments they being in default for non-payment and non-performance of said contract as aforesaid, and said Hansbrough having become insolvent, and

the defendant Ryerson, as a purchase, claiming through the assignee of said defendant Hansbrough as well as said defendant Hardin, set up a claim of ownership to the buildings erected on said premises distinct from the land, without performing the contract of said defendants Hansbrough and Hardin, as purchasers, and paying said purchase money to said com-
34 plainant or any portion thereof, but all said defendants are in default therefor, it is ordered, adjudged, and decreed that said receiver, William L. Greenleaf, esq., do forthwith assign, set over, and transfer to said complainant all the leases, contracts made by h' i while acting in relation to the premises; and that the tenants now holding under him as such do allow and pay said complainant rents accrued or hereafter to accrue under any lease or holding of the premises aforesaid; and that all other or any leases now in force and not made with said receiver be declared of no effect and void as against said complainant, unless in case a party is in possession, claiming under lease made before default made, and that in such case such person so holding shall be liable to said complainant for the rent payable by him; that from the entry of this decree all rents, issues, and profits arrising out of the said premises shall be paid and payable to said complainant, and the possession said complainant shall be full, complete, exclusive and absolute, with all the same rights of ownership and estate as were vested in him over
35 said premises before said premises were sold to said defendants, the said complainant being now declared to be entitled to the same as if his nal estate in said land in fee simple, in equity as well as law, before the making of said articles of agreement. And that no manner of cloud shall rest upon his title to said premises by reason of the default aforesaid of said defendants, or the articles of agreement made in respect to a sale and con veyance of the premises, it is hereby declared that said premises shall be discharged of and from any charge in respect to said articles, and that said William T. Hardin, John G. Hansbrough, their heirs, executors, administrators, assignees, and all persons claiming by, through, or under them, or any of them, are forever debarred from having any estate, right or title, or possession, or right of possession in the premises aforesaid, they having lost the same by their willful default therein; and that said articles of agreement are to be held in relation to the title of said premises as of no effect and
36 void, as against the complainant, his heirs, executors, administrators, or assigns, or any person or persons claiming by, through, or under them, or any of them, and also as to said defendants; and further, the said defendants shall pay all costs of these proceedings, and that complainant have due process of the courts to collect the same.

Endorsed: Filed August 23, 1862.

WM. H. BRADLEY, *Clk.*

37 On the same day, to wit, the twenty-third day of August, A. D. 1862, a writ of subpœna was issued out of the clerk's office, directed to the aforesaid defendants and delivered to the marshal of the northern district of Illinois to execute, which said writ of subpœna, together with the memorandum and also the return of the said marshal endorsed thereon, is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

The United States of America to Philip F. W. Peck, greeting:

We command you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of October next, to answer the bill of complaint of John G. Hansbrough and William T. Hardin,

this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall
38 then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Chicago aforesaid, this twenty-third day of August, in the year of our Lord one thousand eight hundred and sixty-two, and of our independence the eighty-seventh year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.—The above-named defendant is notified that unless he shall enter his appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against him as confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

39 NORTHERN DISTRICT OF ILLINOIS, *ss:*

Know all men by these presents that I have appointed, and by these presents do appoint, W. E. Johnson my true and lawful deputy to execute the annexed writ, (John G. Hansbrough *et al. vs.* Philip F. W. Peck,) and to make true return thereon according to law.

[SEAL.] J. R. JONES,
United States Marshal of the Northern District of Illinois.

I have this 16 day of September, A. D. 1862, executed the annexed writ, (John G. Hansbrough *et al. vs.* Philip F. W. Peck,) by leaving a true copy of the same in the hands of Martha Peters, a member of the family, and a white person over ten years of age, and explained the contents to her at the residence of P. F. W. Peck.

J. R. JONES,
United States Marshal of the Northern District of Illinois.

Marshal's fees:

1 services	$2 00
1 copy	50
1 miles to serve	6
	2 56

By W. E. JOHNSON, *Special Deputy.*

40 W. E. Johnson, being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

Sworn to before me this day of , 1862.

W. E. JOHNSON.

Endorsed: Filed Sept. 23rd, A. D. 1862.

WM. H. BRADLEY, *Clerk.*

On this day, to wit, the sixth day of October, A. D. 1862, came the said defendant, by Hoyne, Miller & Lewis, his solicitors, and filed in said clerk's office in said entitled cause his appearance, which is in the words and figures following, to wit:

Circuit court of the United States for the northern district of Illinois, October term, 1862.

JOHN G. HANSBROUGH AND WILLIAM T. HARDIN
vs.
PHILIP F. W. PECK. } In chancery.

41 We hereby enter the appearance of the defendant in the above-entitled cause this 6th day of October, 1862.

HOYNE, MILLER & LEWIS,
Def't's Solicitors.

Endorsed: Filed Oct. 6, 1862.

WM. H. BRADLEY, *Clk.*

On this day, to wit, the sixth day of November, A. D. 1862, came the said defendant, by his solicitors, and filed in said clerk's office his demurrer to the said bill of complaint in the said entitled cause, which is in the words and figures following, to wit:

United States circuit court, in chancery.

PHILIP F. W. PECK
ads.
JOHN G. HANSBROUGH AND WILLIAM T. HARDIN. } Bill.

This defendant, by protestation not confessing or acknowledging all or any of the matters or things in this said complainant's bill to be true
42 in such manner and form as the same are therein set forth and alledged, doth demur thereto, and for cause of demurrer showeth that the said complainants have not in and by their said bill made or stated such a case as doth or ought to entitle them to any such relief as is thereby sought and prayed for from as against this defendant; wherefore, and for divers other matters, errors, and imperfections, this defendant humbly demands whether he shall be compelled to answer to the said bill, and any of the matters and things therein contained, and prays to be hence dismissed with his costs.

HOYNE, MILLER & LEWIS, *Sol'rs for Def't.*

I, Thomas Hoyne, of counsel for defendant, P. F. W. Peck, do hereby certify that in my opinion the demurrer in this case is well founded in point of law.

TH'S HOYNE, *of Counsel.*

UNITED STATES OF AMERICA, *Northern District of Illinois:*

Philip F. W. Peck, being by me duly sworn doth depose and say that the within and foregoing demurrer is not interposed for delay, but that
43 according as he is advised by counsel it is well founded in point of law.

P. F. W. PECK.

Subscribed and sworn to before me this 6th day of Nov., A. D. 1862, in open court.

PHILIP A. HOYNE, *U. S. Com., N. D. Ill.*

Endorsed: Filed Nov. 6, 1862.

WM. H. BRADLEY, *Clk.*

On this day, to wit, the eleventh day of May, A. D. 1863, in the record of the proceedings in said court in said entitled cause is the following entry, to wit:

JOHN G. HANSBROUGH AND WILLIAM T. HARDIN
vs.
PHILIP F. W. PECK. } Chancery.

Now comes on to be heard the demurrer of the defendant to the complainants' bill herein, and after hearing the arguments of the respective
44 counsel, the court not being sufficiently advised in the premises, takes the same under advisement.

On this day, to wit, the ninth day of June, A. D. 1864, in the record of the proceedings in said court in said entitled cause, is the following entry, to wit:

JOHN G. HANSBROUGH, WILLIAM T. HARDIN
vs.
PHILIP F. W. PECK. } Chancery.

The court having considered and being now fully advised upon the demurrer of the defendant heretofore filed by his attorney to the complainants' bill, sustains the same and dismisses the bill at the complainants' costs. It is therefore considered by the court that it be dismissed at the costs of the complainants, and that the defendant have and recover of the complainants his costs by him about his defense in this behalf expended to be taxed.

And now come the above-named complainants, after a final decree
45 entered in this cause, (the said defendant, by his solicitor and counsel, also being present,) and the said complainants show to the court that the matter in controversy exceeds the sum of two thousand dollars, and thereupon claims an appeal from the said final decree to the Supreme Court of the United States; which said appeal is allowed by the court upon the complainants' entering into bond the sum of one thousand dollars, conditioned according to law, with Levi D. Boone and Claude J. Adams as sureties, and said bond is accordingly filed now in court and approved.

On the same day, to wit, the ninth day of June, A. D. 1864, came the said complainants, by their solicitors, and filed in said clerk's office in said entitled cause their appeal bond, which is in the words and figures following, to wit:

Circuit court of the United States for the northern district of Illinois.

JOHN G. HANSBROUGH AND WILLIAM T. HARDIN, appellants,
vs.
PHILIP F. W. PECK, appellee.

46 Know all men by these presents that we, John G. Hansbrough and William T. Hardin, as principals, and Levi D. Boone and Claude J. Adams, as sureties, are held and firmly bound unto the above-named Philip F. W. Peck in the sum of one thousand dollars, to be paid to the said Philip F. W. Peck, his heirs and personal representatives, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 9th day of June, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

JOHN G. HANSBROUGH, [L. S.]
By WM. HANSBROUGH.
WM. T. HARDIN, [L. S.]
47 By WM. HANSBROUGH. [L. S.]
L. D. BOONE. [L. L.]
CLAUDE J. ADAMS. [L. S.]

Sealed and delivered and taken and acknowledged this 9th day of June, A. D. 1864, before me.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Levi D. Boone and Claude J. Adams, being duly sworn, says, each for himself, that he is worth the sum of two thousand dollars, over and above all his just debts and liabilities.

Sworn to this 9th day of June, A. D. 1864, before me.

I think the security sufficient to the above bond.

TH. HOYNE, *Att'y for Pl'ff.*

Approved. THOMAS DRUMMOND.

Endorsed: Filed June 9th, 1864.

WM. H. BRADLEY, *Clk.*

48 NORTHERN DISTRICT OF ILLINOIS:

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify that the foregoing is a true and complete transcript of the record and all the proceedings had in the cause wherein John G. Hansbrough *et al.* are the complainants and Philip F. W. Peck is the defendant, as the same appears from the original files in said cause and the records of said court now in my custody and control.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this first day of October, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Filed December 7, 1864.

Supreme Court of the United States.

No. 205.

JOHN G. HANSBROUGH and WILLIAM T. HARDIN, Appellants,

vs.

PHILIP F. W. PECK.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND POINTS FOR APPELLANTS,

By A. W. Arrington.

Beach & Barnard, 14 S. Clark Street.

Supreme Court of the United States.

No. 205.

JOHN G. HANSBROUGH and WILLIAM T. HARDIN, Appellants,

vs.

PHILIP F. W. PECK.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND POINTS FOR APPELLANTS.

In the present case, the Bill was dismissed by the court below, upon demurrer. Therefore, since the allegations must be taken as true, the sole question for consideration is—Does the Bill present a case for equitable relief? Hence, a brief history of the facts, as detailed in the Bill, becomes necessary.

About the 30th day of October, 1856, the appellants entered into an agreement with the appellee for the purchase from him of certain real estate in the city of Chicago. The consideration being the sum of ninety-three thousand dollars, two thousand dollars being paid, and receipted, in hand. At the same time, the appellants purchased of the appellee two wooden houses and a barn situated on the

premises, for the sum of three thousand dollars, to be paid for thereafter.

Printed Record, pp. 1 and 2.

On the 29th of Jan., 1857, the appellants paid the further sum of eight thousand dollars on their purchase, including the price of the said houses and barn; and the parties then signed articles of agreement, the appellee stipulating to convey the premises upon certain conditions, and the appellants promising to pay one hundred and thirty-four thousand dollars in a series of successive payments, the last one, of ninety thousand three hundred dollars, to fall due on the 28th of April, 1861.

Printed Record, pp. 6 and 7.

The agreement belonged to a class known in the West by the coarse but expressive appellation of "cut-throat," bearing upon its face the marks of such unconscionable avarice and inhumanity as should render it infamous in any court of the civilized world. Among other pitiless clauses, it contained one providing that in case of default in any of the stipulated payments, and for thirty days after they should be due, the whole agreement should become null and void, at the option of the appellee, and that all previous payments made thereon, should be absolutely and forever forfeited to him.

Printed Record, pp. 7 and 8.

Some time after the making of the said agreement, the appellants entered into possession of the premises; and besides the houses and barn purchased, as before mentioned, of the appellee, they erected other buildings, and made other improvements of a permanent character, enhancing

the value of the property to the amount of twenty-two thousand eight hundred dollars.

Printed Record, p 3.

The appellants made four payments in full, and part of a fifth, the whole amounting to twenty-eight thousand nine hundred and thirty-two dollars.

Record, p. 3.

As has been already seen, the agreement was *per se* hard and unconscionable; but it was rendered still more oppressive by a destructive fire which, about the 4th day of Jan., 1858, swept away the buildings erected by the appellants on the property, and thus compelled them to erect others of like description and value.

Record, p. 3.

The value of the ground-rent of the premises, while in the possession of the appellants, did not exceed fifteen hundred dollars per annum.

Record, p. 3.

From various circumstances, the contract became so onerous, that in November, 1859, the appellants proposed to abandon the same, unless it should be modified and made less rigorous. But the appellee requested them not to abandon the contract, and said if they would pay certain taxes and assessments on the property, and interest then accrued, the whole amounting to ten thousand dollars, that he would, until a revival of trade in Chicago, receive the net income of the premises, above taxes and insurance, in lieu of interest on the purchase money. The appellants accepted the proposition, and paid taxes and assessments,

and interest accrued, to the amount of ten thousand dollars. But the appellee wholly failed to keep his promise; and the Bill expressly charges that he made it with the fraudulent design of inducing the appellants to pay him such ten thousand dollars, he all the while intending to declare a forfeiture of the contract, on the first practicable occasion.

Record, pp. 4 and 5.

The bill also charges usury to a considerable amount.

Record, pp. 3 and 5.

On the 10th day of April, 1861, the appellee filed a bill in the State Circuit Court of Cook County, on the chancery side thereof, against the appellants, to prevent the removal of the improvements previously mentioned, and obtain possession of the premises, as well as for other relief. Afterwards, a decree was rendered in said State court, declaring that the said improvements had become fixtures to the realty, and adjudging the possession of the premises to the appellee, and that the said contract of Jan. 29th, 1857, should be of no effect and void, both as to the said appellee and appellants.

Record, pp. 3 and 4. Also pp. 9, 10, 11.

Subsequently, the appellants filed their original bill in the Circuit Court of the United States, which was dismissed on demurrer, as before stated, and an appeal made to this court.

Under the circumstances detailed we submit that the appellants are entitled to equitable relief on various grounds.

The First Question relates to the repetition of the money—more than twenty-eight thousand dollars—paid by the appellants to the appellee, and literally for nothing.

That the appellee should be allowed to keep this large sum, and the land too, is revolting alike to reason and conscience. The equity of the appellants rests upon the definite rule of law and justice, which prescribes that the parties, upon the rescission of a contract, shall be replaced in *statu quo ante pactionem.*

2 Parsons on Contracts, pp. 192, 193;
Hunt v. *Silk*, 5 East., p. 449;
Norton v. *Young*, 3 Greenleaf's Rep., p. 30;
Buchenan v. *Horney*, 12 Ills., p. 338;
Jennings v. *Gage*, 13 Ills, p. 613.

The appellee seeks to escape from this legal and equitable rule, by interposing that monstrous provision of the contract which authorized him, upon declaring a forfeiture of the agreement, "to retain the money previously paid."

To this objection we answer:

I. The provision for the retention of the payments made previously to the forfeiture, is strictly a penalty.

2 Story's Eq. Jurisprudence, sec. 1314, *et seq.;*
Sloman v. *Walter*, 2 Equity Leading Cases, part 2, pp. 455, 472;
Taylor v. *Sandiford*, 7 Wheaton, p. 17.

Even if the provision in question had specified that the money should be retained as "liquidated damages," it would be, in contemplation of law, a penalty, and nothing more.

Broom's Commentaries, p. 439;
Kemble v. *Farren*, 6 Bingham, p. 141.

The rule of law and equity has ever been "compensation", and not "forfeiture". And parties cannot be permitted to annul such a principle of eternal justice by a a mere stroke of the pen.

II. That equity will relieve against penalties, is an axiom as old as the Court of Chancery.

2 Equity Leading Cases, part 2, p. 472;
2 Story's Eq. Juris., sec.'s 1316, 1318, 1320;
Clark v. *Lyons*, 25 Ills., p. 107;
Hackett v. *Alcock*, 1 Call's Rep., p. 535.

In *Glover* v. *Fisher*, 11 Ills., p. 677, the court say: "It would be unconscionable to let the defendant keep the land as well as the money already advanced."

III. The entire contract has been canceled; first, by the election of the appellee; and secondly, by a judicial sentence passed at his own instance.

Therefore, he can not plead an agreement as a defence, which he himself has caused to be declared void. He can not treat the contract as dead to the prejudice of the appellants, and yet as alive to his own advantage.

When an agreement has been rescinded, by any party, he can never more set it up in a court of justice.

Ford v. *Smith*, 25 Georgia, p. 679.

Hence, as the case stands, the appellee received this money upon a consideration which has failed, and he must restore it. The law of every civilized nation would compel him to do so.

2 Pothier by Evans, p. 349.

THE SECOND QUESTION relates to the ten thousand dollars which the appellee obtained from the appellants by means of false and fraudulent promises and pretences. He is therefore estopped from saying that he received it under the contract.

He received the ten thousand dollars, in fact, under a new agreement, resting in *parol*; and therefore void by the statute of frauds. And hence, according to all the authorities, he must refund the money thus obtained under a void contract, as well as by false pretences.

Rice v. *Peet*, 15 Johnson, p. 503.
Burlingame v. *Burlingame*, 7 Cowen, p. 92;
King v. *Broom*, 2 Hill, p. 485;
Hellman v. *Strauss*, 2 Hilton, pp. 11 and 12.

OBJECTION may be made, "that there is a remedy at law, and therefore equity will not grant relief."

But the following authorities show that this is a proper case for the interposition of a court of equity.

1 Equity Leading Cases, p. 527;
Johnson v. *Glancy*, 4 Blackford, pp. 94, 99;
Anthony v. *Leftwich*, 3 Rand., pp. 238, 256;
Payne v. *Graves*, 5 Leigh, p. 561.
Kelly v. *Bradford*, 3 Bibb, p. 317.
Phillips v. *Thompson*, 1 Johnson's Ch. R., pp. 132, 150;
Parkhurst v. *Van Cortland*, *Id.* pp. 274, 286.

Besides, an account must be taken between the parties. The appellants, though entitled to recover back their money, must account for the rents and profits received while in possession.

Payne v. *Graves*, 5 Leigh, 561.

THE THIRD QUESTION regards the claim of the appellants to recover the value of the improvements made by them, while in legal possession of the premises.

This claim may be considered in two different points of view.

I. The appellants may be considered as *bona fide* purchasers, having made valuable improvements, while in lawful occupancy of the land; and as such, they have an equitable right to compensation for the additional value conferred upon the premises by their money and labor, the rents and profits being at the same time deducted.

Story's Eq. Jurisprudence, sec.'s 388, 799, *b*;
Bright v. *Boyd*, 1 Story's Rep., p. 478;
Inst. Lib. II, Tit. 1, Law 30;
Dig. Lib. VI, Tit. 1, Laws 38, 48.

II. But the claim to payment for these improvements stands on a far stronger ground than that of an ordinary *bona fide* purchaser. For here, the improvements were erected with the appellee's knowledge and consent, and under an agreement which he himself has since rescinded. Hence, according to all the cases, since the appellee has chosen to rescind the contract, he must restore whatever benefit he received under it.

Nor does the agreement itself contain any provision, that upon forfeiture, the appellee may keep the improvements without payment of their value.

The cases previously cited apply to the point of payment for the improvements with tenfold force.

AN OBJECTION is urged on the other side, "that the decree of the State court must be regarded as bar to this part of our bill."

As to this, our answer is conclusive. That decree did not touch the question of payment for the improvements at all. That decree merely adjudged that the improvements had become annexed to the freehold as "fixtures," and therefore could not be removed. But it said not one word as to the right of the appellants to claim the value of the improvements. That question was not in issue; and hence, could not be determined by the decree.

2 Smith's Leading Cases, p. 504.

As to the claim of payment for the improvements, it is perfectly clear that no remedy could be had at law.

Anthony v. *Leftwich*, 3 Randolph, pp. 256, 259, 265.

In the last case, on pages 265, 266, the rule of damages, as to the entire matter, is announced: "It ought to be precisely what the plaintiff was out of pocket in consequence of the acts done by him; and from which the defendant has received a corresponding benefit."

THE FOURTH QUESTION relates to payment for the houses and barn, for which the appellants gave the sum of three thousand dollars. And their right to recover back this money seems too clear for argument. The appellants bought these from the appellee separate from the land; and surely it would be shocking injustice to let the appellee keep these as well as the money paid for them.

THE FIFTH QUESTION relates to *Usury*.

This is specifically charged in the bill, and admitted by the demurrer. Of course, the appellants are entitled to reclaim the sums paid as usury, in a court of equity.

Story's Eq. Jurisprudence, sections 302, 304.

Supreme Court of the United States,

DECEMBER TERM, 1866.

JOHN G. HANSBROUGH and WILLIAM T. HARDIN, Appellants,

VS.

PHILIP F. W. PECK, Appellee.

ARGUMENT FOR APPELLANTS,

—BY—

A. W. ARRINGTON.

Beach & Barnard, Printers, 14 Clark-st., Chicago.

Supreme Court of the United States.

December Term, 1866.

JOHN G. HANSBROUGH and WILLIAM T. HARDIN, Appellants.

vs.

PHILIP F. W. PECK, Appellee.

Argument for Appellants.

The facts, on which the adjudication in the present case must turn, have been stated in a former brief of mine which was filed at the last term of this court; and they are also recapitulated, though with some artistic coloring, in the able and most elaborate argument presented in behalf of the appellee. A formal or introductory enumeration of the same facts and circumstances will therefore be unnecessary in the present effort. It is unnecessary, also, for the reason that the printed record numbers but fifteen pages, and is thus perhaps the most concise that was ever brought into this court. Hence, I shall at once address myself to the task of supporting the points made in my former brief, and of grappling, as best I may, with the powerful show of authorities marshalled on the side of my adversary.

I desire, however, to make a preliminary remark, which the counsel of the appellee may construe, if he pleases, as apologetical. During the whole course of my professional life, I have entertained a settled conviction that equity possesses the inherent and most salutary power to grant relief in cases like

the present; and, for the same time, it has been my fixed determination to test the question whenever the opportunity should offer to discuss it before a proper forum. I mean a forum which, while following prudently and perseveringly the *via trita via tuta* of ancient precedent, nevertheless refuses, and has always refused, to lose sight of the maxim of Marcellus in the Regulæ of the civil law—*Et si nihil facile mutandum est ex solennibus, tamen ubi æquitas evidens poscit, subveniendum est.* Dig. Lib. 50, Tit. 17, sec. 183.

It is possible, I admit, that this opinion of mine may be the result of instinct excited by the rude contact of actual experiences, rather than a cold inference deduced from the investigation of adjudged cases. I have seen so many instances of utter ruin to confiding and, it may be, improvident purchasers, wrought by the cruelty of these harsh, penal contracts, where Shylocks without pity or shame, after reducing their victims to beggary by payments exacted, resumed the land sold naked, covered with costly improvements, and, one might almost say, colored with the life-blood of the ejected tenants, that my indignation may, perhaps, render me incapable of that calm discrimination which is so essential to the solution of legal problems. But among all the cases I have witnessed, I remember none so cruelly unconscionable as this. It has all the penal provisions, all the "cut-throat" clauses of the worst of its class. And then, as if that were not enough to stamp it with perfect inhumanity, it contains an addition, concealed under the thick veil of conveyancers' verbiage, far meaner than all the rest. It is in these words: "And the said "party of the first part further covenants and agrees with the "said party of the second part, that upon the faithful per- "formance of the said party of the second part of their un- "dertaking in this behalf, and of the payment of said notes "above mentioned, in the manner specified, he, the said par-

" ty of the first part will, without delay, well and faithfully " execute, acknowledge and deliver, in person or by attorney " duly authorized, to the said party of the second part, their " heirs or assigns, a deed of conveyance of all the right, title, " and interest of the party of the first part of, in and to, the " above-described premises, with the appurtenances, with " covenants of warranty against any act or thing done or " suffered by the party of the first part." Record, p. 7.

From this, it will be seen that the purchasers were to have no assurance of a valid title. Had they fulfilled all the stipulations of their hard agreement, they would only have been enabled to demand a quit-claim of the interest held by their vendor in the premises, with a specious, but useless covenant of special warranty. What judgment must any enlightened conscience pronounce on that provision? When a vendor gets a full price for his land; when he accumulates on that price an enormous usury; when he guards his agreement with clauses of the most stern and stringent forfeiture; when he sets around it as sentinels, for double security, the most pitiless penalties; when he evinces thus, and in every possible way, his fixed purpose to exact from the vendees the uttermost farthing called for by the contract,—shall he not be compelled to give a deed with the customary covenants? But in this case, instead of doing that, or agreeing to do it, he merely utters empty echoes of a language which seems loud in the promise of future truth while resounding with a present lie. The provision as to title was a cheat and fraud in itself. The purchasers, no doubt, understood it, as thousands of others have understood similar clauses to their cost and sorrow, as stipulating for a complete warranty, when it only provided for a quit-claim in disguise.

This is our case in brief. Peck sold his property to us for what must be assumed as its full value—$90,300. By add-

ing interest, a considerable part of which was usury, the consideration was raised to $134,700. At the same time, he sold us two wooden houses and a barn for $3,000. He delivered to us the possession of the premises, naked, with the exception of the wooden buildings which we paid for. We clothed the land with improvements. A sudden conflagration swept all these away like a dream of the night. We erected others in their place. The change in the grade of the streets by municipal authority, and effected at our expense, rendered the latter useless and unprofitable for a year. A commercial crisis shook the credit of the whole country, and unnerved our arms. We appealed to Peck for mercy, saying humbly, "Show us some favor, or we must abandon the contract." He replied, "Raise me $10,000 to pay certain taxes, assessments and charges, and interest accrued, and I will take the net income from the property over and above taxes and insurance, in lieu of interest on the purchase money, until a revival of the trade and business of Chicago." He said this with lips steeped in fraud; for the settled purpose of his heart was to pocket the $10,000, and then declare a forfeiture on the very first opportunity. We raised the $10,000, and paid it into his griping hands; but it only hardened his conscience the more, thus proving the eternal truth of the well-known line in Juvenal,—

Crescit amor nummi, quantum ipsa pecunia crevit.

He continued to enforce all the original provisions of the contract with increasing rigor. And although we had paid him $28,900, and put improvements on the land increasing its value to the amount of $22,800, he declared a forfeiture for the non-payment of a comparatively small sum of interest; and now claims the right to keep all—the land, the money paid, and the improvements.

Under such circumstances, can we find no relief in equity? In the multitude of those beneficent principles which have been elaborated by the enlightened conscience of humanity's best, and the cultivated intelligence of its wisest, can we not find one adequate to the redress of a wrong so shocking alike to common sense and the sentiment of legal justice? We shall see.

PRELIMINARY QUESTION.—Before entering upon the discussion of the different problems involved in the case, it may be necessary to call attention to their mode of presentation.

The record offers, as a basis of adjudication, only our bill, and the appellees general demurrer. The demurrer assigns but a single cause, which is expressed in these words: "That "the said complainants have not, in and by their said bill, "made or stated such a case as doth or ought to entitle them "to any such relief as is thereby sought and prayed for, from "and against this defendant." Printed Record, p. 13.

As to the scope and effect of a general demurrer like this, the following rules have been established by the courts:

I. A demurrer to a bill in equity must be good to its full extent, or it will be overruled *in toto*.

"A demurrer to a bill must express the grounds of the "demurrer. And a cause of demurrer not assigned can not "be noticed in an appellate court."

Nash v. *Smith*, 6 Conn., 421, 427, 428.

"If a defendant is bound to answer any portion of a bill, "a demurrer to the whole is bad."

Brockway v. *Copp*, 3 Paige, 539.

"Where a bill is good in part, though bad as to the resi-"due, a general demurrer to the whole bill will be bad."

LeRoy v. *Veeder*, 1 Johns. Cases, 417, and notes.

Laight v. *Morgan*, 1 Johns. Cases, 429.

"A demurrer bad in part, is bad *in toto.*"

Thompson v. *Newbin*, 3 Ire. Ch. R., 338.

"A demurrer, unlike a plea, must be overruled *in toto*, "unless it be good in its full extent."

3 Ire. Ch. R., 346.

Mayor of London v. *Levy*, 8 Vesey, 398;

Todd v. *Eyre*, 19 Vesey, 280.

"If a bill sets up several claims, a general demurrer will "be overruled, if the court has jurisdiction of any of such "claims."

Castleman v. *Veitch*, 3 Randolph, 598.

"The general rule is, that where a demurrer goes to the "whole bill, it must be good as to all, or it is good for no-"thing."

Fancher v. *Ingraham*, 6 Blackford, 139;
Blount v. *Gaven*, 3 Heywood, 88;
Carter v. *Longworth*, 4 Hammond, 384, 385;
Higinbotham v. *Burnet*, 5 Johns. Ch. R., 184;
Barnawell v. *Threadgill*, 5 Ire. Eq., 86;
Burns v. *Hobbs*, 29 Maine, 273;
Ulrica v. *Papin*, 11 Missouri, 42;
Outwater v. *Berry*, 2 Halst. Ch. R., 63.

"When a bill is multifarious, and is not demurred to for "that cause, the defect will not be noticed in an appellate "court."

Wellborn v. *Tiller*, 10 Alabama, 305;
Abraham v. *Plestoro*, 3 Wendell, 538;
Oliver v. *Piatt*, 3 Howard, 412.

II. A demurrer to a bill, for want of equity on its face, will not be sustained, unless the court is satisfied that no dis-

covery or proof, properly called for by the bill, can make the subject matter of the suit a fit case for equity cognizance."

Morton v. *Granada Academies*, 8 Smedes & Mar., 773.

In *Bleeker* v. *Bingham*, 3 Paige, 251, Chancellor WALWORTH said: "This is a general demurrer for want of equity; and it must be overruled unless the court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations in the bill, can make it a proper subject for equitable jurisdiction."

Clark v. *Davis*, Harrington's Ch. R. 227.

It is true, that new causes of demurrer may be assigned on the argument, *ore tenus*, but this can only be done in the court *a quo*, and not in the appellate court; because it can only be done on the payment of costs, and with leave to the complainant to amend.

Robinson v. *Smith*, 3 Paige, 222;
Garlick v. *Strong*, 3 Paige, 440;
Attorney General v. *Brown*, 1 Swanst., 288.

Remembering then that all the questions to be determined arise on general demurrers, I now proceed to their discussion, adopting, however, a different order from the one pursued in my former brief.

FIRST QUESTION: Is the decree of the State court a bar to the relief sought by the bill in this case? In other words, can the matters litigated in the present suit be considered as *res judicata*, and, especially, on a general demurrer which contains no allusion to any former judgment or decree?

I take the negative. I submit that the decree of the State court can have no sort of influence on the adjudication of the questions now in litigation, and for the following reasons:

I. For a former judgment or decree to be a bar, it must be a decree determining the very point agitated in the suit sought to be barred.

Redmond v. *Coffin*, 2 Dev. Ch. R. 437, 443;
Matthews v. *Roberts*, I Green's Ch. R., 338.

"A former decree can only be an estoppel as to facts *put in issue*, and found."

Crandall v. *Gallup*, 12 Conn., 365, 366.

"There can be no bar, unless the *precise point* was put in issue and decided."

Abbe v. *Goodwin*, 7 Conn., 377.

"A former decree is not evidence of any thing to be inferred from it by argument."

Kennedy v. *Scovil*, 14 Conn., 61.

"The precise point must have been determined."

West v. *Jarrett*, 3 Har. & J., 485;
Mennde v. *Delaire*, 3 Desau., 43.

And, when properly construed, so are all the authorities.

II. The decree in the State court does not touch one of the points raised by the present bill.

The decree of the State court determines these matters only:

1. That the appellants should be restrained from removing the improvements made on the land, because such improvements had become fixtures.
2. That the appellee should recover possession of the premises.
3. That the appellants had made defaults in their payments.
4. That the articles of agreement for the sale of the land should be null and void. Printed Record, 9—11.

But we only seek by the present bill:

1. To recover the value of the improvements erected on the land. Well, the former decree says nothing about that. In the former suit, there was no issue as to that.

2. To recover back the payments made on the contract, and which are claimed by the appellee as the penalty of our default. But the former decree says nothing about that. And, indeed, the strong inference, to be deduced from the silence of the decree on that subject, is that the court was silent from a sense of justice.

3. To recover back the $10,000 obtained from us by the means of Peck's fraudulent promise. And the former decree says nothing about that.

4. To recover back the usury exacted on the payments made. And surely the former decree says nothing about that.

Hence, by a bare inspection of the present bill and former decree, it is self-evident that no single point of the one is tangent to any point of the other.

III. To state a more formal or technical reason, the demurrer does not specify the decree in the State court as an objection to relief in the Federal forum. It does not rely upon that decree at all, as a bar. It merely objects that our bill does not present a case properly within the equitable cognizance of the court. But according to all the books, a former judgment or decree does not operate as a bar, whatever may be its effect by way of evidence, unless it be relied on by plea, demurrer, or answer.

VIEW OF THE OTHER SIDE ON THIS QUESTION.

The learned counsel for the appellee contends that the decree of the State court is a conclusive bar, because the mat-

ters set up in our bill "could have been litigated" in the former suit; and he seems to understand the rule of *res judicata* to embrace all that "could have been litigated" in a particular suit, as well as all that was in fact litigated. See Mr. Hoyne's argument, p. 15.

In support of so broad a doctrine, the counsel cites a vast array of cases—so many, indeed, as to remind one of the controversial device which Whately in his logic fitly characterizes as "the fallacy of references." However, I am greatly obliged to the gentleman for his profusion, since I am now enabled to invoke his chosen authorities as witnesses in my own favor.

The first is the case of *LeGuer* v. *Gouverneur*, 1 Johnson's Cases, 492.

The learned counsel represents the Court of Errors, in this case, as saying: "That the judgment or decree of a court of competent jurisdiction is not only final as to the matters actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided."

This was the formula enunciated by RADCLIFF, J. But it is incorrect to call it the language of the Court of Errors, when three of the judges gave separate opinions, each one expressing the rule in a different manner; and one of them, LANSING, Ch. J., regarding the case then in hand as an exception to the general rule.

KENT, J., stated the rule as follows: "Every person is bound to take care of his own rights, and to vindicate them in due season, and in the proper order. This is a sound and salutary principle of law. Accordingly, if a defendant having the means of *defence* in his power, neglects to use them, and suffers a recovery to be had against him by a competent tribunal, he is forever precluded." 1 Johnson's Cases, 502.

This formula is unexceptionable, because it limits the rule of *res judicata* to matters which might have been used by way of defence, and contains no reference to matters of cross-claim.

The case was reviewed and criticised in the subsequent one of *Yates* v. *Fassett*, 5 Denio, p. 21.

The facts in the last-mentioned case were these : One sued in replevin in the *detinet*, pleaded only *non-detinet*, and had a verdict in his favor and a judgment for costs, but not for a return ; and afterwards demanded of the plaintiff the property which had been delivered on the writ of replevin, and then brought trover for it against the plaintiff in the former suit. And the court *held*, " that the action was maintainable, though the plaintiff might have so pleaded in the former suit as to have entitled himself to a return, or to the value of the property in damages, and had omitted to do so." And, after a thorough discussion, the conclusion of the court was : " The principle settled," (in *LeGuer* v. *Gouverneur*,) seems to relate to matters of defence proper, and not to matters proper for a cross action." 5 Denio, p. 41.

Testing the question now under consideration by this principle, it is exceedingly clear that the matters set up in the present bill could not possibly have been used by way of *defence* in the State court. We could not have urged the fact that we had erected improvements on the land, or that the improvements were of great value, or that we had paid $28,000 on the contract, or that Peck by a gross fraud on a subsidiary agreement had swindled us out of $10,000, or the fact of heartless usury, or any one of these, or all of them together, as a bar to a decree. The most which can be said is that we might have made some of these matters the foundation of a cross bill. But certainly no one will contend that the *bare possibility* of seeking affirmative relief by a cross bill can op-

erate as an estoppel against the same relief in a subsequent suit.

Another case cited in the argument of Mr. Hoyne is that of *Hibshman* v. *Dulleban*, 4 Watts, p. 190. But the case is powerfully in our favor; and the law on the subject is presented in a manner so luminous that I take the liberty of quoting the decision *in extensio:*

"The *Opinion of the Court* was delivered by GIBSON, C. J. The defendants having pleaded a release to the plaintiff's declaration for a legacy and the plaintiff having replied *per fraudem*, the defendants rejoin that the release was exhibited by them in the Orphan's Court, and allowed by that court as a decisive bar to exceptions taken by the plaintiff to their administration account; and the question raised by the demurrer is, whether the validity of the release has passed *in rem judicatam*. The law of the case with its distinctions, has been compressed into the dimensions of a nutshell, by Chief Justice DE GREY, in the Dutchess of Kingston's case, 11 St. Tr. 261; and though the passage is a trite one, yet as it could not otherwise be so well expressed, it is proper to repeat it in his own words: "From the variety of cases in respect to judgments being given in evidence," said the Chief Justice, "these two distinctions seem to follow as being generally true: first, that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar—or as evidence, conclusive between the same parties on the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point, is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction, is evidence of any matter incidentally cognizable, nor of any mat-

ter to be inferred by argument from the judgment." This brief but comprehensive summary furnishes a rule for every case that any complication of circumstances can produce. Now, did the question of fraud come before the Orphan's court directly or incidentally? Not directly certainly; for that court had jurisdiction of it but incidentally, and not to entertain an action whose immediate object should be to ascertain the fact. In Blackham's case, 1 Salk., 290, the defendant proved that the goods, for the conversion of which the action was brought, had belonged to Mrs. Blackham, whose administrator he then was; to rebut which, the plaintiff proved that he was her husband; whereupon the defendant contended that the marriage was conclusively negatived by the grant of administration to himself, in preference to the plaintiff, her pretended husband. But Lord HOLT said, that though a matter directly determined by the sentence could not be gainsaid, yet that the principle has regard but to a point directly tried, and not to a matter collaterally inferable from it. The same principle was recognized by the king's bench, in *Clues* v. *Bathuest*, Ca. Temp. Hardw. 12. The case of *Rex* v. *Vincent*, Stra. 481, in which it was held, that the production of a probate by a prisoner indicted for forging a will, is conclusive for him, has been repeatedly overruled. And the judgment must not only have been direct, but conclusive of the matter adjudged, in the court where it was rendered; for, as is justly remarked by Mr. STARKIE, part two, section sixty-five, if it did not decide the point there, it ought to decide it elsewhere. On all these grounds the decree of the Orphan's Court was incompetent to affect the plaintiff in his common-law action. The validity of the release was drawn into contest incidentally; and the point being thus incidentally decided against him, can no more prejudice his title in another court, than can the decision of a surrogate or register preju-

dice the title of an unsuccessful claimant of administration to the estate of a decedent. Again, the point was not actually, or at least necessarily, decided. The plaintiff's exceptions to the administration account, were also the exceptions of Henry Dullebau's trustees ; and whether the release was good or bad, was a question whose decision could not supplant a decision of them on the merits. It did not supplant it ; and the gratuitous determination of a point involving the question of fraud, which had no effect there, ought to have no effect here, especially to deprive the plaintiff of a trial by jury. Judgment affirmed.

Another case cited by the learned counsel is that of *Church* v. *Leavenworth*, 4 Day, 274. And in this the rule is laid down as I have previously stated it : "To make a verdict evidence, it must appear from the record, that the same point was directly in issue between the same parties in the former case, and was found by the jury." 4 Day, p. 277.

Another case adduced in Mr. Hoyne's argument is *Heyden* v. *Boothe*, 2 A. K. Mar. 353, which simply announced the well known rule : "That the judgment of a court of competent jurisdiction is conclusive between the same parties." And several of the counsel's other cases decided that, and nothing more. But all these are as irrelevant to the case in hand as the decision in *Leavensworth* v. *Tomlinson*, 1 Root, 436, which the counsel also quotes, and which is only to the effect: "That a former prosecution and acquittal is a good bar to a second for the same cause."

SECOND QUESTION : Can the appellants recover back the money paid in pursuance of their executory agreement with the appellee, after the same has been rescinded by him ?

In my former brief, I cited the general rule on this subject, "that the parties, on the rescision of a contract, should be

replaced *in statu quo pante actionem.*" The authorities to that effect are as numerous as they are uniform, of which it is not necessary to adduce more than those on my brief; namely, 2 Parsons on contracts, 192, 193; *Jennings* v. *Gage*, 13 Ills., 613, &c,

In opposition to our claim in this respect, Mr. Hoyne's argument urges the case of *Haynes* v. *Hart*, 42 Barbour, 58.

The latter was a case at law, being substantially as follows: On the sale of a canal boat, it was agreed that the purchaser should have the use and possession of the boat until default in making payments according to the contract, such payments being by instalments; and in case of default, the vendor might take possession of the boat, and declare the contract void. Upon default, the vendor did declare the contract void, and resumed possession of the boat. On this state of facts, it was *held*, that the purchaser could not recover back the payments previously made.

In delivering the opinion, the court use the language cited in Mr. Hoyne's argument, p. 12, with an addition highly suggestive, however, which Mr. Hoyne does not see fit to quote. The pith of the paragraph stands thus: "To allow the plaintiff to recover back the purchase money paid in a case like this, would be to offer an inducement to purchasers to violate their agreements. It would give him" (the plaintiff) the use of the canal boat for a year without compensation, and put it wholly in his power to perform or not at his pleasure. 42 Barbour, 59.

Now, I find no sort of fault with this adjudication as being a correct one at law. Under the peculiar circumstances, it could not have been otherwise. The only objection to the opinion is, that the two cases adduced in its favor, as authorities, do not even tend to support it; and, as Mr. Hoyne's ar-

gument also relies on these, it becomes necessary to notice them briefly.

The first case referred to by the court in 42 Barbour, is that of *Green* v. *Green*, 9 Cowen, 46.

But the point decided in this last case was: "To warrant a recovery as for money had and received, paid under a special contract to convey land, a strict performance must be shown by the plaintiff, the same as if he had sued on the special contract itself, unless the contract has been expressly *rescinded*, or impliedly so, as by nothing having been done under it for a long time, or the party sought to be charged having acted inconsistent with it."

Now, the latter alternative clearly sustains our case. Because here, the appellee has procured a decree in the State court expressly rescinding the contract under which our payments were made, and declaring it void *ab initio*. Therefore, according to the doctrine announced in *Green* v. *Green*, we would be entitled to recover back our money.

The second case referred to in 42 Barbour, and relied on by Mr. Hoyne, is that of *Battle* v. *The Rochester City Bank*, 3 Comstock, 88.

The case was this. By a special agreement between the plaintiffs and defendants, the latter were to pay the former $1823.44, by applying it on a contract for the sale of land which the defendants were to execute to the plaintiff. The land contract was entered into accordingly, and the $1823.44 endorsed thereon as the first payment, no money, however, being actually paid by the plaintiff, but the sum above named being credited to the plaintiff as the agreed value of certain land received from him by the defendants. The plaintiff failed to make the subsequent payments on the special land contract; and, for that reason the defendants rescinded the

contract in pursuance of a provision therein giving them a right to do so. The plaintiff then sued at law for the $1823.-44. And it was held that he could not recover, for the following reasons: 1. That although $1823.44 was receipted on the contract, it had been shown by the parol not to have been paid in money. 2. That where the obligation of a party is to pay a sum in land, and he is not in default, he cannot be compelled to pay in money.

However, considering that the case was at law, it can have no bearing on the present controversy. What the learned counsel for the appellee needs is to find a case which says that money paid under circumstances like those alleged in our bill, can not be recovered back in equity. He has found no such case. He cannot find any such case. I challenge its production.

I freely concede that we could not recover back this money at law; and that is the reason why we seek relief in equity. We could not recover at law, because we had, for a time, the use and occupation of the premises contracted to be sold. But we may recover in a court of equity which has ample power to relieve us from the penalty we have incurred, and, at the same time, to decree full compensation to the appellee, as well for our use of the premises, as for any other loss that he may have sustained by our default.

The provision for the retention of the money paid, in case of default, was strictly a penal clause in the contract; and it imposes precisely such a penalty as may be relieved against in equity. See authorities in my former brief, p. 5.

It is, however, urged on the other side, that we could only entitle ourselves to the favorable interference of equity by tendering payment of the entire sum of $134,000 stipulated for by the contract.

To this the answer is clear and conclusive. The contract has been wholly annulled and declared void by the decree of a court of competent jurisdiction. And it would be absurd to tender performance of a contract which has ceased to exist. That part of the decree in the State court, relating to this point, is as follows: "And that no manner of cloud shall rest upon his" (Peck's) "title to said premises by reason of the default aforesaid of said defendants," (the appellants here) "or the articles of agreement made in respect to a sale and conveyance of the premises, it is hereby declared that the said premises shall be discharged of and from any charge in respect to said articles, and that said William T. Hardin and John G. Hansbrough, their heirs, executors, administrators, assignees, and all persons claiming by, through, or under them, or any of them, are forever barred from having any estate, right, or title, or possession, or right of possession in the premises aforesaid, they having lost the same by their willful default therein; and that said articles of agreement are to be held in relation to the title of said premises as of no effect and *void*, as against the complainant, his heirs, executors, administrators or assigns, or any person or persons claiming by, through, or under them, or any of them, AND ALSO AS TO SAID DEFENDANTS." Printed Record, p. 11.

THE THIRD QUESTION relates to that part of the bill in which the appellants seek to recover the value of the improvements made by them while in possession.

As to this, I crave permission to refer to my former brief, ps. 8 and 9.

I now call special attention to the case of *Anthony* v. *Leftwich*, 3 Randolph, 238, as fully sustaining our claims in this case, as well for recovery of payments made under the contract, as for the value of our improvements.

That was a case for the specific execution of a parol agreement to convey land upon the ground of part performance. Specific execution was refused for the reason that its operation would be inequitable under the special circumstances. But the court decreed compensation to the complainant who had expended his money in the improvement of the property.

In rendering their judgment, the court use this language: "If, however, the contract was so uncertain that it could not be specifically executed, or if the variance between the contract proved, and that insisted on in the bill, presented an insurmountable obstacle to relief in that form, these circumstances would not preclude the court from giving relief by compensating the plaintiff for the actual loss which he has sustained, in consequence of acts done upon the faith of some agreement, and from which the other party has derived an equivalent benefit; especially as the defendants do not admit, nor offer, nor are able to perform any agreement." 3 Randolph, p. 264.

Again, on page 265, the court lay down the rule of redress: "As to the measure of that compensation, it ought to be precisely what Anthony was out of pocket in consequence of the acts done by him upon the faith of the contract; and from which Leftwich, and those claiming under him, have received a corresponding benefit."

A still stronger case in our favor is that of *Payne* v. *Graves*, 5 Leigh, 561.

The *Syllabus* gives a correct statement of the facts and rulings of the court, as follows: "A purchaser of land is put in possession, and pays part of the purchase money, under the contract, but being sued by the vendor for the balance of the purchase money, he defends himself on the ground that the contract was void by the statute of frauds, and so defeats the

action: *Held*, that the purchaser, after thus disaffirming and abandoning the contract, is not entitled to specific execution thereof in equity, but he is entitled to have the money he had paid refunded to him."

"It being proper to direct an account to ascertain what is due to the purchaser for moneys paid by him in part of the purchase money, it is proper also to direct an account of rents and profits of the land while in his possession; and if on such account it appears that there is a balance due to the defendant, it is proper to decree such balance to him."

"In general, where a plaintiff's bill renders an account necessary, the account should be ordered for both parties, and both become actors."

No account was sought by the bill; and as to that, the court say: "Although the plaintiff did not by his bill demand an account of what was due him, *in toliden verbis*, yet he demanded that which the chancellor properly decided would require an account to ascertain." 5 Leigh, p. 568.

Surely, as to these two last cases, we are justified in saying *quatuor currunt ped bus*. They stand, in all material respects, on all-fours with the present.

The case of *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. R., p. 273, is to the same effect.

That was the case of a bill filed for the specific execution of a contract to convey land. The court refused the relief sought, because the agreement set up rested partly in *parol*, and was too uncertain to admit of specific enforcement, although there had been a part performance; but the court decreed compensation to the plaintiff for beneficial and lasting improvements.

On page 286, the Chancellor says: "I shall accordingly correct the decree heretofore pronounced in this case, and shall direct a reference to a master to take and state an ac-

count between the parties; and that in taking the same, he charge the plaintiffs with the rent, if any, in arrear, and with what shall appear to be a reasonable rent for the time the same was not agreed on by the parties; and that he make to the plaintiffs a reasonable allowance for beneficial and lasting improvements made by them on the land."

It may be said on the other side, that these cases are not parallel, because they related to contracts only in *parol*, while the contract in the present case was in writing; the former being void *ab initio*, under the statute of frauds, and the latter merely annulled and rendered void by the acts of the parties and the decree of the State court.

But one may well ask, and not without astonishment, where is the difference? And has any court, or elementary writer, ever suggested such a difference? Can there be a legal difference between contracts which are void at the present instant? Can a difference be logically predicated between things non-existent? Certainly that which has ceased to be must stand in the same category with that which never was at all.

FOURTH QUESTION. Can we recover back the $10,000 obtained from us by the fraud of Peck, in November, 1859?

As to this, it seems impossible to make a serious question. The proposal for a temporary modification of the contract came from Peck; and it was accepted by us, in good faith, and fully complied with. And the bill expressly charges that the proposal on Peck's part was fraudulent both in design and effect. Then, on what principle of equity or justice, shall he be permitted to retain that money thus procured by a willful and deliberate falsehood. See Printed Record, p. 5.

Mr. Hoyne's argument objects, that we can sue for, and regain that money at law.

To this, the answer is conclusive. We cannot recover that money at law, because we derived some benefit from the arrangement. We had the use and occupation of the premises until Peck enforced his forfeiture. And under these circumstances, the counsel's own favorite case of *Haynes* v. *Hart*, 42 Barbour, 58, shows that we could not have a recovery at law. And the same thing is taught us by the cases cited herein from 3 Randolph, and 5 Leigh.

Mr. Hoyne's argument also objects, that there was no consideration for Peck's promise of November, 1859.

I reply that the reciprocal considerations for that engagement were the mutual promises of the parties; and I shall certainly not spend time in proving to this court that a contract may be modified, either temporarily or permanently, without any new consideration other than the new mutual promises of the parties.

In fine, the legal state of the case, as to the $10,000, is this: the appellee obtained that money by a monstrous fraud; but we cannot recover that money at law, because we received a benefit from the arrangement. Therefore, equity will entertain jurisdiction to state an account between the parties, which shall do ample justice to both.

FIFTH QUESTION. Are we entitled to recover back the large sum exacted from us as usurious interest?

The bill, Printed Record, p. 5, submits that Peck should refund to the appellants "so much of the moneys paid him as was for interest at a greater rate than six per centum per annum, which excess over and above that rate amounts to a large sum of money, to wit, seven thousand six hundred dollars."

To this claim, the learned counsel makes three objections.

I. That by the laws of Illinois, the parties may stipulate for the payment of interest at the rate of ten per cent. per annum.

I answer, that is so by the laws of Illinois as they stand at present; but it was not so as the law stood at the date of our contract. The contract bears date, the 29th of Jan. 1857. And the law allowing the parties to stipulate for ten per cent. interest was not approved until Jan. 30, 1859; and is in express terms confined to cases occurring after its passage. See Purple's Statutes of Ill's., Vol. 1, p. 634.

The previous law, the one in force at the date of the contract, was in these words: "The rate of interest upon the loan or forbearance of any money, goods, or things in action, shall continue to be six dollars upon one hundred dollars for one year, and after that date, for a greater or less sum, for a longer or a shorter time."

1 Purple's Stat. of Ill's., p. 633.

II. A second objection of the learned counsel to our claim is, that it is barred by the statute of limitation.

The statute to which he refers is as follows: "Any person who for any such loan, discount or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received," (six per cent.,) "and his personal representative, may recover in an action against the person who shall have taken or received the same, and his personal representatives, three-fold the amount of money so paid, or value delivered above the rate aforesaid, either by an action of debt in any court having jurisdiction thereof, or by bill in Chancery in the Circuit Court, which court is hereby authorized to try the same: PROVIDED, said action shall be brought or bill filed

within two years from the time when the right thereto accrued."

1 Purple's Stat., p. 634.

It is obvious, on its face, that the limitation imposed by this law applies to suits for the three-fold penalty, and to nothing else. But we are not seeking to recover the penalty. We seek merely the money wrongfully exacted. Hence, the counsel's objection does not apply.

III. It is urged on the other side, that we can have no relief from the usurious contract without tendering what is justly due under it, namely, the $134,000 mentioned in it.

I think the bare statement of the proposition is its perfect refutation.

The learned counsel also urges that the claim for usury was abandoned in the court below.

But how does that fact appear? Where is it to be found in the record? Or has the counsel been authorized by the clerk to report and certify it *ore tenus?* This is like another fact asserted by the learned counsel; to wit, that the improvements, alleged in the bill to have been swept away by a destroying fire, were rebuilt within six months by the insurance companies. That is making his general demurrer *speak* as loud as the most noisy plea or answer. I suppose the reply of the court to all such irrelevant declarations in the dark regions beyond the record, will be—*Quod non apparet non est.* I do not think the court would grant a feigned issue to be sent before a jury, even if I were to tender a traverse, or plead in confession and avoidance.

In point of fact, I admit, that the argument of the ques-

tion of usury was waved, *pro tempore*, in the court below; but how that is to be construed into a bar by abandonment, I am at a loss to imagine.

In conclusion, I submit that the case of the appellants, independently of its complete justification on the grounds of equitable principle and authority, appeals in the most powerful manner to that eternal sentiment of right and justice which forms an ineradicable instinct in every human heart; and which, by the pure, tranquil light of its original inspirations, like sunbeams falling out of heaven, constitutes the primary truth, as well as the highest interpretation of all law.

Respectfully submitted,

A. W. ARRINGTON.

Supreme Court of the United States.

Dec. Term, 1865.

JOHN G. HANSBROUGH, and WILLIAM T. HARDIN, Appellants,

vs.

PHILIP F. W. PECK.

ARGUMENT OF THOMAS HOYNE,

FOR APPELLEE.

Beach & Barnard, 14 S. Clark Street.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1865.

JOHN G. HANSBROUGH and WILLIAM T. HARDIN, - -	*Appellants,*	*In Chancery.*
vs.		
PHILIP F. W. PECK, - -	*Appellee.*	

ARGUMENT ON BEHALF OF THE APPELLEE,

By ***THOMAS HOYNE.***

CHICAGO:
BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK ST.,
1866.

ARGUMENT FOR APPELLEE.

The appellants in this case instituted a Bill in Chancery to recover of appelle about the sum of $28,000! The bill seems to be a claim in the nature of a mere *money demand to recover damages!* The claim on account of the alleged usury is not relied upon. It was abandoned on the argument of counsel below by appellants, while arguing the demurrer. It will not be insisted upon in this court. The subject will, therefore, receive no attention at my hands.

If the claim were seriously made that usury had tainted the contract, we should of course have insisted upon the insuperable objection that, in equity, this constituted no ground of relief or recovery, while the appellants neither tendered or offered to pay what was *bona fide* due (Story's Eq., sec. 301,) under the contract; that by the laws of Illinois ten per cent. may be stipulated for by agrreement of parties (1 Purple's Revised Statutes, p. 683, chap. LIV); that the contract is not avoided thereby, and that in any event the claim for recovery is barred on this ground by the *limitation of two years* in the statute. Any further reference, therefore, to this subject will not occupy this argument.

The claim of the appellants, as made on the face of their bill, seems an extraordinary one with which to seek the interposition of an exclusively equitable court. The appellants insist upon the recovery of certain sums of money voluntarily paid out in part performance of an agreement, while they are in *default* for its non-performance, and refuse to go on, or perform the stipulations of the agreement on their own part. They even go further, and demand

a return of certain moneys expended by them, without any consent of appellee, on the property which constituted the foundation of the contract whose provisions are utterly disregarded by themselves.

In making this claim, neither *mistake*, *fraud* or *accident* is alleged to excuse the non-performance of the contract by appellants; but it seems as if the whole foundation upon which the appellants assert this claim lies, as the court will see, in the general charge that the contract was "hard, unconscionable and oppressive." That the *bargain*, after it was made, turned out to be a bad one for appellants, seems to be, on the face of the bill, the only excuse offered for a violation of its provisions; upon which, again, the appellants base a demand of indemnity against appellee for entering into it with them. And, again, this preliminary characterization of the case would lack a chief element in its completeness, if I omitted to state that after the contract was violated—the appellants utterly refusing performance—the appellee was compelled to invoke the aid of the courts of Illinois in his favor, and a decree of a court of competent jurisdiction was rendered against the appellants, finally determining, between the same parties to this record, the identical questions and interests under the contract which are made the foundation of this controversy.

The bill of appellants sets out the contract as *Exhibit A*, (*page 6 of Record*), as part of the case; also the proceedings in the Circuit Court of Cook county, Illinois, as instituted on behalf of appellee against appellants, and the decree in that case is made an *exhibit* and marked B, as part of the appellants bill herein.

STATEMENT OF THE CASE MADE ON THE BILL OF APPELLANTS.

The contract set out shows, that in January, 1857, the appellants became the purchasers from appellee of seven lots in Chicago at a consideration of $134,700 purchase money. The purchase money was made payable in 9 several installments, each being for $4,300, except the last installment, payable in April, 1861, for $90,300.00 (Page 6 of Record).

The bill further shows that about four of the installments only were paid, besides the sum paid down on the execution of the contract.

The bill alleges what might probably be true, that though $134,700 is expressed as the entire purchase-money, in the contract, yet that the last installment to be paid, of $90,300, in April, 1861, was the real cash price or consideration of the purchase, while the intervening payments of $4,300 each, might have been intended in the nature of a compensation for the postponement or delay of the principal sum, which was never paid. (Bill—see Record, p. 2, folio 7). The appellants were further to pay all taxes and assessments on the land purchased.

It is expressly stated in the contract (page 6 of Record) that the party of the *first* part (appellee) at the request of the party of the second part (appellants), and in consideration of the money to be paid and the covenants to be performed by said parties of the second part, "*that the prompt performance of the covenants, and payment of the money shall be a condition precedent, and that* TIME IS OF THE ESSENCE OF THE CONDITION. Upon this condition the appellee agrees to sell upon the terms, and for the payments as stipulated in the contract. TIME IS MADE, in this *agreement*,

of the ESSENCE of *the contract* by the *express agreement* of the parties.

And it is also mutually agreed (Record, page 7), that in case default shall be made in the payment of any or either of said notes or any part thereof, at the TIME or any of the TIMES above specified for the payment thereof, and for 30 days thereafter, the agreement and all the preceding provisions thereof shall be null and void, and no longer binding, at the option of said (appellee) party of first part. And all the payments which shall have been made absolutely and forever forfeited to said party of first part, or at his election, the covenants and liability of the (appellants) party of second part shall continue and remain obligatory and may be enforced, and said consideration money, with interest, be collected by appellee.

And, further, it is also declared, " that in case of default " in the payments as aforesaid, promptly on the days " named by the parties of the second part, that it is also the " right of said party of the first part to declare the contract " ended, and prior payments forfeited, and to consider all " parties in the possession of the premises at the time of " such default, *tenants at will of said party of the first part* " (the appellee) at a rent equal to 10 per cent. on the whole " amount of said purchase money, payable quarter yearly " from the day of any default in such payment of said " notes, etc. And the vendor from that time is declared to " be restored, with the possession and right of possession " in the premises, to the exercise of all powers, rights and " remedies provided by law or equity to collect such rent, " or remove such tenants, the same as if the relation of land- " lord and tenant were created by an original, absolute lease " for that purpose on a special rent payable quarterly on " a tenure at will, and that in such case the said tenants

"shall and will pay, or cause to be paid, all taxes and as-
"sessments, ordinary and extraordinary, which may be
"laid or assessed on such premises during the continuance
"of such tenancy, and will not *commit or suffer any waste*
"*or damage* to said premises or the appurtenances; but
"will keep and deliver, on the termination of such tenancy,
"the said premises and appurtenances in as good order and
"repair as they were at the commencement of such
"tenancy."

The bill further shows that, under this contract the appellants went into possession of the lots, and made sundry changes thereon by changing the buildings *then on the premises*, and erecting new (frame or wooden) buildings thereon, so that an income might be produced by such occupancy. It is alleged that large sums of money were thus expended, as well in paying taxes as in improving the sidewalks, and that the value of the premises was thus greatly enhanced, &c.

But the appellants say that the said contract was a hard and unconscionable agreement, and that it was therefore wholly out of their power to complete the payment of the moneys thereby required to be paid, and that the same was rendered still more so by a destructive fire which occurred in 1858, burning off the buildings on the premises.

(They *do not allege*, however, a fact that those buildings were afterwards restored within 6 months by the Insurance companies).

The bill of appellants further alleges, that the appellee, on or about the 10th day of April, 1861, filed his bill of complaint in the Circuit Court of Cook county, Illinois, against the said appellants on the chancery side of said court and one Martin Ryerson, to prevent the threatened

removal of the said buildings and improvements by said Ryerson, to whom a sale of them by appellants was alleged in the said complaint of the appellee. And as further appears from the decree of the Circuit Court attached to said appellants bill in this case as *Exhibit B* (p. 10 of Record): "the said appellants having wholly failed to perform their "contract with appellee, and in all things relating to the "payments thereof; *they being in* default for non-payment "and non-performance of said contract;" and the said appellant, HANSBROUGH, *having become insolvent;* that the said Ryerson claimed the *said buildings*, DISTINCT FROM THE LAND, *as a purchaser* of the assignee of said appellant Hansbrough, as well as of the said appellant Hardin; and that as such purchaser, without performing the stipulations of the contract with the appellee, in behalf of said appellants, he was about to commit "*irreparable waste and damage on* "*said premises by removing off the premises the buildings* "*erected, which had become attached as fixtures to the* "*land*" (See decree attached as Exhibit B, to complainant's bill; Record, page 9), "*against the consent of said* "*appellee.*"

The Bill of appellants further shows, that the appellee procured, in the Cook County Circuit Court, the appointment of a Receiver against the appellants, who took possession of the premises, received the rents, issues and profits, and under directions from the court, took special charge and care of said premises until a hearing could be had and a decree be rendered in said cause. And that, finally, on or about the 26th day of May, 1862, a decree was made in said cause by said Circuit Court sitting in chancery, "in and by which said decree (as the appellants allege in their bill herein) "*the said Receiver was required* "*to account to said Philip F. W. Peck for all rents receiv-*

" *ed by said Receiver, and to pay the same over to said* " *Peck.*"

And the said appellants also in this case, by their bill allege, that the said decree so obtained by the appellee recites, that the buildings and improvements made by them had become *fixtures* to the realty. And that the court adjudged, among other things, that said Peck should have full, complete, exclusive and absolute possession of said premises, with all the same rights of ownership and estate as were vested in him before the said premises were so sold to said appellants. And that the said articles of agreement were to be held, in relation to the title of the premises, as of no effect and void against said Philip F. W. Peck, his heirs, executors, administrators or assigns (See decree as attached, marked *Exhibit B*, and made a part of appellants said bill in this case.

The bill further sets out that said appellee (Peck) has declared said contract of January 29, 1857, no longer binding upon him by reason of the appellants inability to pay, and their " having failed to *make the payment of Oct.* 29, " 1859, *and the other payments afterwards falling due, ac-* " *cording to the express terms of said contract as specified,* " *and that he (appellee) had elected to declare a forfeiture* " *of all the moneys paid him under said contract, he* " *having by said contract become entitled to hold the same.* (See Record, p. 12.)

The appellants then show that the contract to them being intolerably oppressive, they, in November, 1859, obtained some promise from Peck, that if they (appellants) would pay taxes and assessments, he would thereafter so accommodate and indulge them that they (appellants) could carry on the contract, and that he would take the net income of said property over and above taxes and insurance; but that

Peck neglected to carry out or abide by said proposition, and thereafter continued to enforce the contract with rigor.

The appellants, then, insist that they should be relieved from the forfeiture, that said Peck should refund the moneys paid, and that he should also pay the appellants for the improvements made on this property. And to this effect is the prayer of the appellants for relief (Page 18 of Record).

This bill being demurred to for want of equity, the court below sustained the demurrer, and the appellants bring the case here by appeal.

The court will observe on the *face of the bill* of appellants, that of the sum of $134,700, to be paid by them according to their contract, they allege only the payment of *four* of the installments, of $4,300 each, and some $2,000 on the note due in 1857, making a total of about $19,200; and that the last payment was made in Oct., 1859 (Record, p. 8), while the bill of the appellee to restrain them from removing the buildings and improvements from the land, was filed, as is truly alledged, on the 10th day of April, 1861. (Record, p. 10.)

Thus it is *shown on the face of the bill*, that the appellants had been in default for non-performance of their contract some two and a half years before the bill in the state court was filed, and instead of proposing to perform the contract, *insisted then*, as they *insist now*, that on account of its hardship, they should be relieved against its terms, while still *holding the possession* against appellee, collecting the rents therefor, and finally proceeding to *strip off the improvements*, by selling the buildings to one Ryerson, against whom and appellants the appellee obtained

an injunction and receiver in the state court, to prevent the deliberately designed waste and devastation of the property.

On this statement of their case, by the appellants, on the face of their bill in this cause, the appellee takes up the following points of objection, upon which he was sustained in the court below, on demurrer to the bill:

1st. The bill is not maintainable as a bill to recover back money paid or laid out in part performance of a contract, because the appellants are themselves in default, and refused to perform their contract with appellee.

2d. The court will not entertain jurisdiction of the bill, because it seeks compensation in the nature of damages, only.

3d. The bill shows, on its face, that the same *identical matters* have before been litigated between the *same parties*, in a *court of competent jurisdiction*, and that a FORMER *decree* was rendered thereon forever determining the rights of the parties, and in which the appellants might have litigated, if they did not, and have had decided all matters put in controversy by them in this cause.

4th. Irrespective of all other questions in this cause, the appellants being in default, and not only so, but refusing to perform the contract, in fact *repudiating* its terms, without any pretence of fraud, mistake, or accident, to excuse them, they are entitled to no relief whatever.

5th. The claim that the court can relieve against penalties or forfeitures, does not apply in this case. Here, there is nothing to be relieved against. The rights of the parties are fixed and determined by law; and no compen-

releasing

sation in damages can be made by this court now to appellee, in lieu of the benefits and rights which he has surrendered by ~~rehearing~~ releasing appellants on their liability under the contract, and relinquishing the advantages of his sale, upon finding the appellants were *obstinate in their default* and refusal to perform the contract, and pay up the purchase money.

I will consider the above questions in their order.

I.

The claim made to recover back money paid in part performance of an executory agreement, by appellants, while *in default themselves*, and refusing to perform, is altogether untenable.

The case of *Haynes* v. *Hart*, 42 Barbour, S. C. Rep. 58, is decisive of the question, and cites the cases of *Green* v. *Green*, 9 Conn. 46, and *Butler* v. *The Rochester City Bank*, 3 Comstock, 88.

In the case of *Haynes* v. *Hart*, 42 Barb., 58, the court says: "The vendor might at his election rescind the con- "tract in case of a default by the purchaser in making "payments. The vendor did rescind for that reason, and "it was held by the Court of Appeals that a purchaser "could not recover his money back. The plaintiff cannot "recover on the ground of his own breach of the agree- "ment, and the contract does not provide for a repayment "of the money on part performance in case of a rescission. "To allow the plaintiff to recover back the purchase "money paid in a case like this, would be to offer an in- "ducement to purchasers to violate their agreements."

There is nothing which I can add to the cogent reason-

ing of the court, except to say that, in the case made by the bill of appellants, they seek to recover, not merely the money paid in part performance of a contract, which they have since refused to complete, but also large sums of money voluntarily expended by themselves, under no obligation or provision of the contract, not even by request of appellee. Their claim on this ground, simply stated, is: that, expending money for their own benefit, to improve the land purchased, they have found it unprofitable or impossible to hold it, and therefore now demand of the vendor reimbursement and indemnity for the sums expended. They have only to add a claim for their time and service, and the legal absurdity of the proposition will appear fully to be stated.

II.

The bill of appellants, as I stated in the outset, comes before the court in the nature of a mere money claim for damages, and the reimbursement of moneys expended, while the court has no jurisdiction to grant any other relief. Indeed, it is not asked that any other relief, except the payment of money, may be granted.

Chancery takes no cognizance of suits for damages only founded on contract.

Kempshall v. *Stone*, 5 Johns. Chy., 193.
Moses v. *Elmendorf*, 11 Paige, 277.
Hatch v. *Cobb*, 4 Johns. Chy., 559.

And where the claim is solely for damages, whether for breach of the contract or for fraud in making it, and it is not sought to rescind it altogether, the party is, as a general rule, confined to his action at law.

Mayne v. *Griswold*, 3 Sandf., 463.

It is also held, that a bill for the purpose of obtaining a compensation for a fraud, in damages merely, will not lie when the objection is raised at the proper time by a demurrer, or answer.

1 Bibb, 212.
Litt. Sel. Cases, 374.
4 Dana, 195.
7 Cranch, 69.
13 Price, 749.
1 Barb. Chy., 125.
3 Barb Chy., 127.
10 Paige, 333.

In the case of *Newham* v. *Macy*, 13 Price, 749, a bill was filed to compel a vendor of real estate to pay the difference between the actual value of the property sold, and the value, as it would have been, if the representation had been true. The court says: "It is not in every case of "fraud that relief is to be administered in a court of "equity. In case, for instance, on a fraudulent warranty "for sale of a horse, or fraud in sale of a chattel, no one, "I apprehend, ever thought of filing a bill in equity.

"The cases of compensation in equity, I consider to have "grown out of the jurisdiction of courts of equity, in re-"spect to contracts for the purchase of real property, "where it is often ancillary as incidentally necessary to "effectuate decrees of specific performance. This, how-"ever, appears to me no more than a common case of "fraud by means of misrepresentation—raising a *dry* "*question of damages, in effect a mere money demand.*"

This case is followed in the N. Y. cases cited; and also see the case of—

Russell v. *Clarke Executors*, 7 Cranch, 89.

The Chief Justice (MARSHALL) is indignant that "the "rule with regard to giving courts of equity jurisdiction "on account of some *claim to discovery*, should be *abused* "by employing it as a mere pretext for bringing causes "proper for a court of law, into a court of equity."

III.

The decree of the State court in Cook county, between the same parties, determining their rights under the same identical contract, and in which, as matter of fact, the same matters were litigated (or could have been litigated), must be regarded as forever putting an end to further controversy.

The principle is decided in the case of *Le Guer* v. *Gouverneur & Kemble*, 1 Johns. Cases, 492.

The case was one in equity, upon a contract which had been the subject of a suit at law. The complainants in the case had had a judgment at law recovered against them by the defendants in the chancery suit. The complainants found, after the judgment was recovered, that very gross frauds had been practiced against them in the contract, which was for the sale of certain parcels of indigo and cotton, for the value of which the judgment at law had been recovered, and so brought their bill in chancery for relief.

The court of errors, however, in reversing the decree of the Vice Chancellor, say:

"The first question, therefore, which presents itself, is "whether the recovery at law precluded the relief sought "in equity. If it did, the decision on this point will put "an end to the cause; if not, there are other questions "which remain to be examined.

"The general principle, that the judgment or decree of "a court of competent jurisdiction shall be final as to the "subject matter thereby determined, is conceded on both "sides, and can admit of no doubt. The principle, how- "ever, extends further. It is not only *final as to the mat- "ter actually determined, but as to every other matter* which "the parties might litigate in the cause, and which they "might have had decided.

"The reasons in favor of the extent of the rule appear "satisfactory. They are founded on the expediency and "propriety of silencing the contention of parties, and of "accomplishing the ends of justice by a single and speedy "decision of all their rights. It is evidently proper to "prescribe some period to controversies of this sort; and "what period can be more proper than that which affords "a full and fair opportunity to examine and *decide all their "claim.* This extent of the rule can impose no hardship. "It requires no more than a reasonable degree of vigil- "ance. A different course might be dangerous and op- "pressive. It would tend to *unsettle* all the determinations "of law, and open a door for infinite vexation."

This principle is recognized and followed in Illinois.

Gray v. *Gillilan*, 15 Ill., 456.
Dalton v. *Bentley*, 15 ibid, 421.

In the case of *Hopkins* v. *Lee*, 6 Wheaton, U. S., 110, this court decide that, in an action of covenant brought at law to recover damages for failing to convey land, that the decree of a court of chancery between the same parties, and substantially involving *the same questions*, under the contract, that the decree must be regarded as conclusive of the controversy.

In this the court say: "There is, and ought to be no "difference between a verdict and judgment in a court of "common law and a decree of a court of equity. They "both stand on the same footing, and it would be difficult "to assign a reason why it should be otherwise."

Other cases without number may be cited on the general principle, "*interest reipublicae ut sit finis litium.*"

Voohees v. *U. S. Bank*, 10 Peters, 474.
Neafie v. *Neafie*, 7 Johns. Chy., 1.
Perrine v. *Dunn*, 4 ibid, 140.
Mitford Chy. Pleading, 237.
2 Story Eq. Jurisp., Sec. 1523–24.

12 Wend., 399.	3 Cowen, 120.
4 Cowen, 559.	3 Johns. Rep., 20.
7 Cranch, 567.	4 Day, 274.
4 Vermont, 616.	4 Bibb, 508.
1 Wheaton, 304.	6 Cranch, 286.
1 Mo. R., 282.	2 A. K. Marsh, 353.
4 Watts, 183.	1 Root, 436.
1 Peck, 62.	

The principle of the conclusiveness of a judgment or decree applies to any instance where a suit is sought to be sustained upon allegations which would have constituted proper ground of defence to a previous action between the parties.

Mariot v. *Hampton*, 7 Durn. & East, 265.

(See note of all the cases decided to case of *Le Guen* v. *Gouverneur and Kemble*, 1 Johns. cases, 491; 2d edition published in 1846.)

IV.

But irrespective of the other questions arising in the case, the appellants have no claim upon the appellee in this court. They are not only in *default*, but they in terms *refuse and repudiate* any performance of their contract with appellee. There is no pretence even made that the appellee ever failed or refused on *his part* to perform his agreement. And there, finally, is no pretence that any fraud, mistake or accident has ever occurred to excuse this *obstinacy of default*, and the seeming determination of the appellants to willfully disregard and violate all the engagements of the contract with appellee.

The court could not now, even if asked for, grant the appellants a prayer of specific performance; even though they offered to perform all to which they had become solemnly bound.

Without any legal or equitable excuse, they come into this jurisdiction as "derelictors" in the wrong. The contract expressly makes TIME an *essence of its conditions* as to the prompt payment of the purchase money on the day and days when it was made specially payable. A small per centage of the whole sum of $134,000—being some $20,000—was only paid. The remaining installments became due and remained unpaid. The appellee, *willing* to abide by the contract, *delayed any proceeding of forfeiture*, hoping that appellants would ultimately perform the agreement as he had desired. Nor was the hope abandoned until, as the decree of the State court, made a part of appellants bill, shows, the appellants and one Ryerson *were about to devastate the property, and strip off the improvements for which, by the present proceedings, they claim indemnity and damages.*

The bill fails utterly in imputing any moral, equitable or legal default to the appellee. It is not a case where both the parties are in the wrong, and one is insisting upon a rigid application of technical rules under a hard contract to the other. The appellants complain only because the bargain was *oppressive*, and as they say, "*unconscionable.*" If so, they made it freely, and there is no complaint of any constraint upon their action. The truth is, it turned out for the time, *unprofitable.* They went on to the land in in 1857, when it was ruling at high prices. If in 1859 it again declined, this furnishes no good reason why the appellee should be deprived of the benefits of the higher prices which his property commanded in the markets of 1857.

The appellants proceed as if it was *their* right to prevent his selling to *others*, by buying *themselves*; because, if they can purchase at a time when prices are high, wait the turn of the market to see whether "the market was a gainful or losing one," and then repudiate their purchase, and recover back the purchase money by such a proceeding as this, it would not be at all inconsistent to suppose that their object at the beginning was, to prevent any sale of the property to others, and unless it proved a thriving speculation on their hands, to give it up afterwards themselves.

This, though the logic of appellants' case, is contrary to the fundamental rules upon which the courts administer right and justice in cases like this.

I believe it will be found, even in cases where the court can relieve a party in default against a penalty or forfeiture in a contract, that some excuse founded upon *waiver*, *mistake*, *fraud* or *accident*, must be offered; and that then the courts only relieve the party in default upon condition that ample compensation can be made by way of damages to the other party in the contract.

But in all cases, the courts regard TIME as MATERIAL where the parties themselves have so declared in the contract, and will not relieve a party who is in default against it; but leave him to his agreement.

In the case of *Stinson* v. *Dousman*, 20 How., 466, the rules are thus laid down in a somewhat similar case by Justice CAMPBELL.

He says the record discloses a case of inattention and neglect on the part of defendant, which authorized the plaintiff at law to annul the contract.

The rule is thus laid down:

"In respect to contracts for the sale of land, a court of "equity in general does not exact from the parties a punc- "tual performance of their engagements, to entitle them "to its aid in obtaining a specific performance. If the "contract is silent in respect to the condition of time, or "fails to indicate a distinct purpose of the parties to make "it an essential consideration, and where no circumstance "exists to manifest its importance, it is the habit of the "court to relax the stringency of the rules of legal inter- "pretation on that subject, and to decree and direct com- "pensation even in cases where there has been inattention "or neglect. But if the parties have declared in their con- "tract that *time* is a material consideration, and have "agreed that their rights shall depend upon a scrupulous "fidelity to their engagements, it does not belong to the "court to make another law for the parties. Where it "plainly appears that the sale is conditional, and its com- "pletion is dependant upon the fulfillment of any of the "conditions with punctuality by either party, a court of "equity, in general, will not interpose to relieve the party "in default on the principle that time is not of the essence "of the contract."

I desire to direct the attention of the court to the language of the contract cited in the above case by Justice CAMPBELL, as being less decided even, in its terms, than the language of the contract between the parties in this case, as to making the *time* of payments *material and essential* in the conditions of performance.

Kemp v. *Humphreys*, 13 Ills., 674, was a land contract case, in which the purchaser had gone on to the land under the contract, *made improvements*, but failed to pay the money agreed upon within the time fixed, and though *time* was not *declared in words to be of the* essence of the contract; yet the court held the performance of the vendor, from the language of the contract, dependant upon a punctual payment of the purchase money at the day, and refused the relief asked for.

The court say: "Parties have the right to make their "own contracts, and may, if they think proper, make the "time of their performance material, so that a failure to "perform at the time will avoid the agreement. The only "question is,—is time of the essence of the contract, and "did the parties so intend? If so, a court of equity is "bound by the contract as the parties made it, and has no "authority to substitute for it another and different agree-"ment."

The court says at the close of the opinion in relation to THE IMPROVEMENTS, that they can cut no figure in the case for the reason that plaintiff failed to prove any parol contract of purchase, and they cannot avail him *under the written contract, because he failed to comply with it.*

The last sentence may be taken by way of confirmation of the other current authority, in showing that, as a general rule, the claim of a party to recover back anything under a contract which he fails to perform, is totally inadmissible. No case can be cited in support of it.

In *Anderson* v. *Frye*, 18 Ills., 94–5, the court say, the general rules applicable to the facts in the bill, require the party seeking relief to show that *he has been in no default*, in not having performed the agreement, and that he has taken all proper steps toward the performance on his part.

In the case of *Wynkoop* v. *Crowing*, 21 Ills., 585, the court say: "Parties may make the *time* of the perform- "ance one of the conditions of the contract, and when they "do, courts of equity will not relieve a party from default "where the other party has not waived or acquiesced "in it."

Citing— 5 Gilman, 314.
Glover v. *Fisher*, 11 Ills., 673.
Chrisman v. *Miller*, 21 Ills., 236.

In the case of *Chrisman* v. *Miller*, 21 Ills., 236, the court say:

"It is conceded on all hands that parties have a right "to make their contracts as stringent as they please, and to "make time of the very essence of their contracts; and if "one party, without the consent of the other, allows the "specified time to pass, no matter from what cause, without "performing the condition, the stipulated consequences "must follow. * * *

"The contract is, that if the payments should not be "made at the stipulated time, then the purchaser's interests "under the contract should cease. The clause of *forfeiture* "was put in for the benefit and security of the vendor, and "did not release the purchaser from his covenants to pay "till the covenantees chose to avail themselves of that "clause. Till then, the rights and liabilities remained the "same as if no such clause was in the contract. After de- "fault by Burke, they had the right, at any moment, to de-

" clare the forfeiture, and thus deprive themselves of the " right to sue on the covenants, and deprive Burke of a " right to claim a performance," &c., &c.

The court will, in the case at bar, remember that the appellants claim that the appellee has put an end to his contract, and deprived himself of the right to sue on the covenants of the contract on account of appellants own default. Not only so ; but that the bill in this case is filed to recover damages on account of that default. That, in fact, the damages are claimed on account of a breach of contract perpetrated, not by appellee, but by the complainants themselves. I find it difficult to imagine, much more so to find, a case where the wrong of a party himself should be made a ground of recovery against one whom he had wronged. Yet it does, in the light of authority and reason, seem as if such a case was now at the bar of the court.

In support of the same general doctrine already referred to in the cases in the Illinois and U. S. Supreme courts, are the following cases :

Brashear v. *Gratz*, 6 Wheat., 533.
Anderson v. *Frye*, 18 Ills., 94.
Bishop v. *Newton*, 20 *ibid*, 178.
Brown v. *Cannon*, 5 Gil., 180.
Morgan v. *Herrick*, 21 Ills., 496.
Stone v. *Pratt*, 25 Ills., 35 ; 13 *ibid*, 577.
Morgan v. *Smith*, 11 *ibid*, 201.
Andrews v. *Sullivan*, 2 Gil., 327.
Bradwell v. *Bradwell*, 1 Gil., 600.
Doyle et al. v. *Teas*, 4 Scam., 265.
Seymour v. *Delancey*, 3 Conn., 505.
Osborn v. *Thompson*, 2 Wheat., 336.
Hepburn v. *Auld*, 5 Cranch, 262.
Hepburn v. *Dunlap*, 1 Wheat., 179.
Smith v. *Wells*, 7 Paige, 24.

V.

The appellants, in the prayer of their bill, claim relief against a forfeiture. The court is asked " to relieve them " against the forfeiture insisted upon by said Peck under " his contract, so far as to be restored to what they have " lost thereby and paid thereon, and that they may recover " back the moneys paid in pursuance of said contract by " them, as aforesaid." (Record, page 6).

Considering the reputation of the counsel against us, a strange misconception of the powers of this court seems to be manifested in the theory and structure of the appellants case.

Under the special jurisdiction claimed by courts of equity in cases of *penalty aud forfeiture*, the appellants claim a general power of interference or relief in all cases. Not merely claiming that the power exists to relieve against, but to also restore and indemnify. Not only that a party shall forego the right to enforce a penalty or forfeiture without compensation, but that he shall be answerable at any time afterwards for restoration and indemnity.

The true foundation of the relief in equity as laid down by Judge STORY, and all the great equity Judges, in these cases, is, that as the penalty or forfeiture is designed as a *mere security*, if the party obtains his money or his damages, he gets all he is entitled to.

Story's Eq- Juris., sec. 1316.
Skinner v. *Dayton*, 2 Johns. Chy. R., 535.

The ground of any interference whatever, in cases of penalty, is based upon the principle that wherever a penalty is inserted merely to secure the *performance or enjoyment of a collateral object*, the latter is considered as the principal

intent of the instrument, and the *penalty* is only deemed as an accessory—that it is intended only to secure the due performance thereof or the damage really incurred by a non-performance. In every such case, the true test generally, by which to ascertain whether relief can or can not be had in equity, is to consider whether *compensation* can be made or not. If it cannot be made, courts of equity will not interfere. (Story's Eq. J., sec. 1314).

Such is the equitable doctrine as to relief against penalties. But it is still narrower in cases of FORFEITURE.

Mr. Justice STORY says (sec. 1320), that there is a distinction between penalties and forfeitures. In the former, relief being always given if *compensation can be made.* In the latter, it is not always given though compensation can be made.

" It is now the doctrine of the English courts, that in " cases of FORFEITURE for a breach of any covenant, other " than a covenant to pay rent, no relief ought to be granted, " unless upon the ground of *accident*, *mistake*, *fraud* or *sur-* " *prise*, although the breach may be capable of a just com- " pensation." (Sec. 1323, Eq. J.)

But finally, after discussing the entire question of relief in such cases, Justice STORY says (sec. 1324), " that courts " of equity will never interfere in cases of forfeiture for the " breach of covenants and conditions, where there cannot " be any just compensation decreed for the breach."

See, also,

Skinner v. *Dayton*, 2 Johns. Chy. R., 535.
Sanders v. *Pope*, 12 Vesey, 290.
Robinson v. *Cropsey*, 2 Edwards Chy., 148.

I deem it unnecessary to accumulate in this brief the great mass of authority in support of the general princi-

ples on this branch of our jurisprudence. I have sufficiently shown, under another head of this argument, how "time, when made material," operates against any relief whatever being granted to a party *in default*, even in cases where compensation in damages can be made a full measure of indemnity for the principal or collateral object intended in all cases to be secured by the forfeiture or penalty provided for in a contract.

The appellants, ignoring the whole body of equitable rules limiting the jurisdiction of the courts in cases of forfeiture, claim in this case that the power to interfere in contracts may be exercised, and relief granted in favor of the party in default, without any compensation whatever to the party entitled to the penalty or forfeiture. That this relief shall go upon demand, and without conditions or compensation. That a complainant, himself being in default, refusing to perform or complete his agreement, may neglect even to make his application for relief until after the time when the performance of his obligations or compensation in damages would be rendered a necessary and indispensable condition of the relief he sought. That, in fact, he can *purposely hold back*, until the other party has been compelled, in respect to his own rights, to enforce the forfeiture as the *only security within his reach* affording him a remedy for the breach of the contract; and that then the appellants can come by a bill in equity and recover back all that has been paid, and be restored to all another has received, the same as if no contract had ever been made.

The complainants do not come here to ask that justice may be done, by any offer to discharge the obligations of the contract, or render to appellee any of his rights. On the contrary, the claim is boldly put forward for the fullest

measure of indemnity, because of their own default, by appellants. Before this default, they surely would not have claimed the voluntary expenditures of money made in their own behalf, without the request, or even knowledge of appellee; yet since this default, it is claimed that appellee is liable in taking advantage of their *wrong*, to pay the appellants all sums of money whatever, expended on the land. We can well suppose that if such is in accordance with the rules of equity as understood by appellants, that they deliberately choose to violate the contract, rather to obtain rewards as "covenant breakers," which, in no case ever heard of, could be awarded to them for the most scrupulous fidelity in keeping their engagements.

What can really be more inequitable or unjust than to call now for indemnity—a restoration of the money paid, and the money expended, under a contract which the appellants *refused* to *complete*, or longer even *recognize* as *in existence?*

Deliberately repudiating all its obligations for themselves, they ask from appellee the very money paid to him *in security* that they would abide by and perform their agreement. Without any pretence that *he is*, or has *ever been* in *default*, without any charge of fraud or unfair dealing, the appellee is to first suffer an absolute denial of all further payments, he is to relinquish all the benefits of his sale, and when compelled to prosecute his redress, the appellants, charging him with hardship for merely adhering to the terms mutually agreed upon, demand of him indemnity for what turned out to be unexpectedly an unprofitable or losing bargain to them.

It will be remembered, that the appellee had the option, under the contract, to either take back the land or forfeit

all payments made, in case of default, or else hold the appellants on their covenants to pay all the balance, some $120,000 of the purchase money. The appellee, in exercising his rights to take back the land, rather than hold his covenants for the money, has released the covenants of payment to appellants. This of itself, would, in any case, render it impossible that the appellee could be restored to his original position, as in cases where a rescission of the contract takes place. But if this were so, how could appellants insist upon their default to set up an entire refusal to perform, and yet recover back what was paid in part performance?

The case presented not only offers no compensation to the appellee for his rights of forfeiture, but goes much further, in asking him to surrender up all the fruits of his sale. The appellants, in the year 1857, on a high market, obtained from appellee, as vendor, a contract which precluded his dealing with others in respect to the same land. The appellants refuse, because of a fall in the market after 1857, to perform this contract. The appellee, after long delays, is compelled to elect what he will do. Finally, after an obstinate refusal to go on and perform the stipulations of the agreement, the appellee takes the only measures left him. As the decree, made an exhibit of appellants' bill, shows one of them had become a bankrupt, and a third person, a stranger to appellee, had purchased the buildings, the *very improvements* on this property for which appellants are claiming a return of money expended in their erection, and threatened to remove them as chattels from the land. The appellee resorted to his *forfeiture* as the only security remaining. But he did not redress himself. He did not take the law of the contract into *his own hand*, to execute against these appellants.

No; on the contrary, the appellee sought, as the case shows, the aid of a state court of competent jurisdiction, to which the said appellants were summoned, and in which they duly appeared by the same eminent and learned counsel as represent them in this case. After more than one year's preparation was allowed them, and they were heard by answer and argument, and finally a decree was made, as their bill shows, that the *injunction* originally granted to restrain the threatened waste and devastation of the property purchased was made *perpetual* against them, that their further rights in the property were foreclosed, and that appellee was restored to his possession and title, the same as before said premises were sold to said appellants. (Record, p. 11, Exhibit B).

Thus the appellants have had "their day" in court, to oppose the claims of appellee, or seek the relief they now pray for against him. They could have *litigated*—they *did litigate*—(and the court must presume in this case according to the fact), that the same questions of forfeiture and indemnity were made, and the decree pronounced against them involved the same identical "*contract*" against which they now complain. The whole subject, therefore, stands before this court, *res adjudicata*, and without reversal on error or appeal, must forever be conclusive of the rights of all parties in all the courts of law and equity.

VII.

The Argument of Appellants!

Since writing the above, I have been favored with a copy of the brief filed for appellants in this cause. My *first impression* of it as a production is, that it is a work of sin-

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Since writing the above, I have been favored with a copy of the brief filed for appellants in this cause. My *first impression* of it as a production is, that it is a work of sin-

gular merit and great art. Knowing the ingenuity and great learning of the brother who prepared it, I of course conclude it to be both.

Let me also premise of it, that while it betrays great brilliancy of language and composition, the court cannot be misled by its vituperation! The epithets of "*cut-throat* "*contract, bearing on its face the marks of such uncon-* "*scionable avarice and inhumanity as should render it in-* "*famous in any court in the civilized world,*" will do very well as *rhetoric*, but not as argument. I could on my side echo its phrases, that—

> "Man's inhumanity to man
> "Makes countless millions mourn."

It would sound well as *poetry*, in the proper forum, but would scarcely be appropriate as *prose*, to satisfy the judgments of this court.

Neither do I suppose that the

> "The poet's eye in a fine phrenzy rolling,
> "From earth to heaven, from heaven to earth,"

will effect any serious diversion in favor of appellants. Notwithstanding all this brilliancy of imagination in

> "Bodying forth the forms of things unknown,"

the facts exist the same as before. This very class of "*cut-* "*throat contracts*" have time and again received the judicial attention of all the courts of this country, and been very respectfully treated.

I have cited to the court in this brief some *fifteen* or *twenty* cases in which the *same identical kind of contract*, with all their "*marks of avarice and inhumanity*," have been enforced, without one word of condemnation or reproof.

The case of *Stinson* v. *Dousman*, 20 How., 466, decided in this court, is one of those cases where the contract itself contained provisions similar to the present; and all the cases cited in this brief are precisely to the same effect. I will not repeat them.

I. It is insisted in the argument that there has been a "*rescission of the contract*," and that the parties shall be placed in "*statu quo*," as they were before the contract was made. (Brief, p. 5).

There is cited in support of this position, 2 Parsons on Contracts, 192–3 (the true citation is page 679); *Hunt v. Silk*, 5 East., 249; and two cases in Illinois, viz., 12 Ill., 338, and 13 Ill., 613.

These very cases are conclusive *in themselves* as authority *against* the position assumed and relied upon by appellants.

1st. The contract in this case was partially executed by appellants going into possession under the contract, and occupancy of the land. And even if the *appellee had been in default* instead of the APPELLANTS, still *appellants could not have rescinded*, but could declare only for a breach of the contract. No contract can be rescinded by one of the parties, *unless both* can be restored to the *same condition in which they were before the contract was made.*

2 Parsons on Con., 679.

The very case of *Silk* v. *Hunt*, 5 East., 249, was a case where a lessee of land took possession and entered into occupancy of a house, and the landlord agreed, but failed, to repair within 10 days after receiving £10. The lessee quit the premises because of the *default* of the land owner, and sought *to recover back his money paid!!*

It was held that, "there could be no rescission, because

" a contract cannot be rescinded by one party for the de-
" fault of the other, unless both can be put in *statu quo* as
" before the contract; and here the lessee *had an interme-*
" *diate possession of the premises under the agreement.*"

Without occupying further space with the cases cited by appellants, to show how they overthrow the argument made by themselves, I proceed merely to state the further positions which Mr. Parsons, in his work on contracts, vol. 2, p. 679, and the cases referred to, establish.

2d. No party can take advantage of *his own wrong or default*, to defeat a contract *by rescinding it.*

3d. The contract never was in fact rescinded by the appellee. The appellee was the only party having a right to rescind, as not being *at all in default.* And even had *he* been so disposed, the *partial execution* of the contract on both sides had made that, in law, impracticable.

4 h. This case at bar is a case of the violation of the contract by *appellants;* while, as is expressly contended in their own argument, the *appellee* was *ever insisting upon performance of its* "*monstrous, infamous, and cut-throat*" provisions. (See brief of appellant).

5th. The contract itself provided a *forfeiture*, i. e. called also *penalty* by counsel, as a *security* that the appellants *would* perform their engagements. They refused to perform, and appellee is compelled to avail himself of *this security. What right* is there left in appellants to complain, or claim anything by a rescission?

The counsel say, that equity will relieve *against penalties;* and without going back to a former part of my argument to show that it cannot relieve in such cases as this, I find cited by appellants the case of *Glover* v. *Fisher*, 11

Ill., 677, previously cited by me in this brief. It does seem strange, that a case where the whole learning of the subject is exhausted, to enforce this class of contracts, should be cited for a single isolated extract by appellants, taken out from the context of the decision and law of that case.

The case was one seeking specific performance on a contract which did not declare "*time*" as material, and where an *extension of the time*, as to payments, had been set up by the vendee. But on page 673 the court is found using this language (which I commend to the particular attention of appellants' counsel, as more to the point in this case):

"Where there can be no excuse for the delay, but it is "manifest that the purchaser has wantonly, and in the ex- "ercise of arbitrary will or caprice, refused to pay *at the* "*time*, he cannot with any propriety ask the court to ex- "cuse him for his willful disregard of the specified terms "of his obligation, no matter how soon he may have re- "pented of his perverseness and offered to perform."

The eloquent counsel says, that having cancelled our contract by judicial sentence, we cannot plead it as a defence. We cannot treat it as *dead* to ourselves and *alive* as to them. Our reply is: We are seeking no "*resurrec-* "*tion*" of the contract! It was "dead in the trespasses "and sins" of appellants, and they are making its murder and death the foundation of a claim in equity, the same as if they had been *entirely innocent* of *wrong*, instead of being slayers of the *right!* It would seem as if the *death* of the contract, by judicial sentence, at least, had put an end to this controversy.

II. As to the payment of $10,000 on the contract, when they found it too hard to execute, and which they say was obtained by fraudulent promises to extend time of payment until times revived, &c., it appears that *time was extended*

long afterwards, and that they only *pro tanto* paid on the contract what its obligations required them to pay long before. There could be no valid contract, binding on appellee, because there was no *new* consideration advanced or paid for the promise. Authority is unnecessary on this point. Besides, it could be set up in defence in the State court, or be recovered back at law, if, as is contended, there was no consideration in fact, and the money was not paid on the contract, or if it was, as pretended, obtained by *false pretences.*

III. As to the *third question* made in appellants' argument. We do not raise the question of the *bona fides* of the purchase. There is no doubt it was a *bona fide* purchase, and that appellants made some improvement. The bill, however, of appellants, shows (as see Exhibit B, being the decree of the State court), that they had sold out these *pretended improvements to strangers to appellee;* that *spoliation* of the *property was threatened;* and the State court extended its protection to appellee, as already stated in this brief. There is, therefore, no foundation whatever upon which appellants can base any claim to a recovery for the improvements. The contract does not provide for a removal of them in any event. They of course became *fixtures* to the realty; and they were claimed by purchase, by strangers, who never had either a claim or color of title to this land.

IV. There is one only question—*the fifth*—remaining. It insists upon the charge of *usury* as a ground of recovery.

I have already stated, that in the court below this ground was expressly abandoned. The court below heard no argument, because when I took up the question for argument,

counsel for appellants expressly dismissed that charge in the bill.

I cannot forbear expressing my surprise at finding it now in the points of appellants' brief. In some gentlemen I might *suspect* a motive for such an apparent breach of faith. In this instance I cannot. I am well assured, from the personal respect I entertain towards the counsel, that in one so gifted by nature, of such integrity of head, as well as heart, my generous opponent never permitted such an equivocation of a purpose to be just and candid, unless by imperative instruction of his client, or the direst needs of his case.

The charge, however, is totally groundless in fact, and has no equity, even, in the allegations of the bill. It is not alleged that the contract was a contrivance to cover the usury on any loan or discount of money; nor that over *ten per cent.* was reserved by the *agreement*, as permitted by the statutes of Illinois. And besides all which, the statutes of Illinois provide that any action brought *in debt*, or *by bill in chancery*, to recover back more than the lawful amount of interest paid on any loan or forbearance of money, shall be brought or filed *within two years from the time when the riyht thereto accrued.*

Revised Statutes, Chap. LIV.
See Purple Ed., Vol. 1, sec. 6, 633.

This bill of appellants is filed Aug. 23d, 1862. The contract is dated in Jan., 1857, and the bill alleges nothing paid *after* Oct., 1859. So that, if no other objection were raised in bar of the claim made to recover back the usurious interest, this of itself is sufficient.

The same statute provides a complete remedy *at law* by *action of debt.*

And again. I have already referred to the insuperable objection in a court of equity, that this bill does not offer the appellee the amount of *principal* and *interest bona fide* his due; nor could the relief be granted in any event upon the ground of usury, unless upon a full performance of appellants' contract. In such cases, courts of equity never interfere unless to do *justice* between the parties. The court will not *enforce the penalties* of the usury law, and will only interfere to relieve parties, where it can award to the party, against whom the relief is sought all, that he is justly entitled to. The condition imposed always is, that a complainant shall offer to pay all that is *bona fide* due.

1 Story Eq. Jurisp., Sec. 301.

The law of Illinois does not annul or *avoid* a contract because of usury. It merely *forfeits threefold* the interest reserved, *two-thirds* of which goes to the county, and *one-third* to the debtor. And in cases where more than the legal interest has been paid, which may, by agreement be *ten* per cent., it is provided that an action of *debt* will lie. In this case, there was no payment of interest. The contract shows no such interest to *have been paid.* The bill alleges no interest to *have been paid*, as such, except that it charges that the *installments of the purchase money included* some computation of more than six per cent. interest. Even if this were so, and such interest was included in the installments paid, how does it appear to the court now, that any more than legal interest has *been* paid on the *whole* amount of principal agreed *to be paid?* And how much is to be now *recovered* back as *usurious interest* on such *whole amount?* (Sec. 6, statute referred to.) The appellants have failed to pay on their debt, *either the principal or interest.* Before they can

come into this court, must they not pay, or offer to pay, the amount of both legally due? They ask the court, under the statutes of Illinois, to *enforce a penalty of threefold the interest* reserved, and *recover back* all over the amount which was justly due under that law. But the contract and the bill together show that there is still *due on the contract* more than one hundred and fourteen thousand dollars of *principal*, besides legal interest!!!

Not one cent has been received *over the amount due.*

The justice and equity of the contract, therefore, requires *we shall be first paid* before an action will lie to recover back what is *unpaid!!!*

But I must conclude. The merits of this case may be summed up briefly in this: The complainants seek defendant for a purchase of land. They obtain his terms, and contract in writing as purchasers, and take possession. Finding that, owing to the *decline*, instead of rise in prices, they had made an *unprofitable bargain*, they refuse to perform it, after making some small payments, compared to the whole amount. The defendant, after *long delay*, and many inducements to get them *to perform*, finds them obstinate, and also resorting to *sham sales* of the *improvements*, and attempts *to strip the property bare of the buildings!!* He then obtains the aid of a court of chancery to enforce the contract, and his rights are saved to him by a decree.

What court, under such circumstances, can ever aid appellants to take advantage of all this openly avowed breach of obligation, to be restored now, as their counsel insist, "in *statu quo ante pactionem?*"

THOS. HOYNE,

For Appellee.

IN THE

Supreme Court of the United States.

PHILIP F. W. PECK, Appellee,

ads.

JOHN T. HANSBROUGH and WILLIAM T. HARDEN, Appellants.

REPLY OF THOMAS HOYNE, FOR APPELLEE,

To the 2d Argument of Appellants.

Beach & Barnard, Steam Printers, Nos. 122 & 124 So. Clark St.

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To the 2d Argument of Appellants.

CHICAGO, 1866:
BEACH & BARNARD, STEAM PRINTERS,
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REPLY OF APPELLEE.

The learned counsel of appellants does not seem to be satisfied with his *first* argument in this case. He does not conceal his *dissatisfaction* at the progress of equity jurisprudence, by the advanced principles of which the case must be decided. And he is especially indignant at the appellee, whom personally—as in the case of Verres—like the great Tully, he would immortalize by his invective.

It is not impossible that the learned counsel, in following too closely the great masters of ancient oratory and rhetoric, may insensibly have contracted their mental habits.

According to one of his favorite authors, Quintilian, no accomplishment to the true orator was more regarded, than a fertility or genius for *invention*. In all compositions of the ancient schools, this was a *prime* necessity. It is a fact, vouched for in the case of Verres, by nearly all the learned critics and writers of our own day, that the great oration of Cicero, as it has come down to us, was never really delivered; but that the oration itself, as well as the facts, were the work of Cicero, long after the trial—concocted according to the rigid discipline and highest rules of the schools of ancient oratory and art. Nay, very grave doubt now exists, whether all the crimes, of which the Sicilian pro-consul has been accused to posterity, are not the pure coinings of that fertile invention, for which the great orator was so celebrated.

However this may be, it is in strict accordance with, and legitimate to, the schools of philosophy and rhetoric in which he was educated.

It was the chief business of the learned, in those schools, upon every "Thesis" first to *invent* or discover a "*theory*" of the proposed argument. The facts were to be selected or dealt with according to the skill of the orator. In this respect, they acted as the more modern disciples of Aristottle and Plato have done, taking only and always such facts as could be reconciled with the "theory" in hand, and rejecting all such as were *too stubborn* to be welded into the argument. I think it a fortunate circumstance for the appellee in this case, that the great Bacon, drawing his inspiration from the higher sources of christianity, upon which are based the more enlightened codes of our jurisprudence, has secured to mankind the benefits of his great discovery in the true method of seeking after truth,—that the fallacies of the old schools, no longer endanger or unsettle the impartial administration of justice, and that all our rights depend upon something more certain than the truth of an ancient syllogism in logic, or a "*maxim of Marcellus in the Regulæ of the civil law.*"

It is, for all purposes, infinitely better, that we should proceed according to the received maxims of our own jurisprudence, first to *find our facts*, upon which to build the proposed "theory" of the argument, than to "build castles in the air," which rest upon no foundation on the earth.

I am fully aware that all this preface is as unnecessary, as it is out of the legitimate line of regular argument in the case. But what I more apprehend is, that the judges of this august tribunal may regard it as, what must appear to be a puerile attempt to follow the learned counsel into

realms of discussion in logic, oratory, and metaphysics, where, among his peers, "he only is peerless." This would be a piece of assumption I entirely disclaim.

Oh! it is excellent to have a giant's strength, and, as the poet hath it,

> "It is execrable to use it as a giant."

The excuse I plead for this temerity—and the only point of this preface—is to protest against the inhuman use which the "giant" makes of his strength, by the grossly personal assaults on the appellee, contained in the very fine exordium to his last argument in this case.

Without a single fact to warrant or justify his imputations, the learned counsel has constructed the "*whole plot and theory*" of a case, in which the appellee is made to take the part of the most odious of human characters.! He is denounced to this court as one of the Shylocks, without pity or shame, "reducing their victims to beggary by payments exacted," &c.; as one of those who have resumed the land, sold naked, "covered with costly improvements, "and colored with the life-blood of the ejected tenants." His indignation is excited, "so that he is *incapable* of calm "discrimination, which is essential to the solution of legal "problems." (In this case that is highly probable.) Among all the cases, this is the most "cruelly uncon- "scionable! All the cut-throat clauses of the worst of the "class!—and stamped with perfect inhumanity!!—distin- "guish this case," &c. &c.

And, to sum up the catalogue of the crimes which are thus charged against the appellee, the contract itself, freely and mutually executed by the appellants, is held up to the execration of this court and mankind!

And then, as if dissatisfied with the sound and fury of his rhetoric, the learned counsel makes a statement of the transaction, so different from that contained in the bill of complaint, that it suggests the very natural inference, that this entire statement may have been in itself suggested by the classic quotation from Juvenal, at the close:

"*Crescit amor nummi, quantum ipsa pecunia crevit.*"

After all this, surely, the court may be surprised to learn that the appellee in the case, Mr. Peck, is one of the most peaceful, unostentatious and excellent of citizens; that in all respects he is peculiarly unambitious of conflict with his neighbors, and singularly averse to all legal controversy or litigation. He is also the unambitious source of many great and private charities, preferring rather *to be* charitable, than, like too many others, *seem* to be so. He is ranked among the earliest settlers and founders of Chicago, and for more than 30 years has borne a reputation for integrity and fair dealing, without a blemish. He is, also, the affectionate head of a large and respectable family. Three of his sons have attained to the age of manhood, and *all of them*, inspire general confidence in the discipline of their parental training, by the steady promise and direction of useful and honorable lives. Their characters, too, in this, their early life, are established as supports about the home of their childhood. It is true that Mr. Peck has not escaped the envy of those who are incapable themselves of exercising the thrift and care which bespeak habits of great temperance, diligence and virtue which has distinguished him. In these respects, and in the accumulation of wealth, or property, which follow their exercise, Mr. Peck has been all his life distinguished.

Unlike the many adventurers who have sought the West as an El Dorado, where wealth was supposed to come, as the spoils of war or speculation, without labor and without anxiety, Mr. Peck sought his rewards as the result of great patience, labor and time. The results followed, and no man complains of Mr. Peck that the acquisition of his fortune has not been honestly made, and the necessary expenditure of life and health paid as the price.

Naturally endowed with a very high order of sagacity, he improved it in enterprise, and cultivated it by information. This enabled him to avoid the thousand temptations of early western life and nearly all of its ruinous speculations. Husbanding time and means by his economy, he won the fortune with which others had trifled, and she crowned his efforts with what the world calls her *choicest gifts.*

This is Mr. Peck, the appellee, as he should be *really known to the court*, (if his character, at the bar, is at all necessary to the determination of his rights.)

The learned counsel, in the spirit of that utter disregard to the facts, which distinguishes the assault upon Mr. Peck's character, omits what, too, would materially affect and *qualify* his whole estimate of these "cut-throat contracts," which, in this, and his former argument, he so strongly vituperates.

When the appellants sought appellee, to purchase the land, they found him then, as he has since continued to be, prostrated by disease, and suffering from chronic debility of constitution, so as to be unable to do more than agree to the terms of purchase. The "cut-throat contracts," "with all these marks of avarice and inhumanity," were drawn up, *not by Mr. Peck*, but by an agent, in strict accordance

with "printed forms," sold and distributed in the vicinity of Chicago, for common use, in all cases of sales of land.

And now, with the leave of the court, I will pass from the case as stated in the argument of the counsel, to the case on *record*, as it is stated in the bill of appellants.

The Case on Record.

The case in the bill shows, that in 1856, a season of high prices for city lots in Chicago, the appellants negotiated a purchase of the property in question. Being a property of great value, and situated on a principal *business street*, it appears the appellants purchased it for investment, with a design to make it immediately productive.

They stipulated to pay $134,700, in several installments, payable *semi-annually*; the last of which, being the largest sum, $90,300, was payable in April, 1861. Only *four* of the installments were ever paid, the last being as the bill states, that due in October, 1858. That is to say, only about $18,000 of the whole purchase money *was ever paid!* In case of any default, the contract provided for an *election*, on the part of the appellee, either to declare a *forfeiture*, or *pursue* the parties on their contract.

The contract also provided, that appellants should, in due season, keep *all the taxes paid on the premises subsequent* to the year 1855, and also pay all the *assessments* levied for any purpose against the land. (See page 7, of Record.)

The bill shows also, not only that no subsequent installment of the purchase money was paid after the default in 1858, but that *all the taxes and assessments had been left unpaid!* (Page 4 of Record, fol. 14.)

The bill then complains of the contract being so *intolerably oppressive*, that in November, 1859, the appellants de-

sired to relinquish it, or get some modification of terms, but that Peck proposed that "*they should pay certain taxes, assessments and charges, and interest then accrued, the whole amounting to ten thousand dollars!! within sixty days from the 1st of December, 1859, and he would thereafter accommodate them by taking the net income of the property, after payment of all taxes, insurance, interest and assessments, until a revival in trade and business occurred in Chicago,*" etc. (Record, page 5.)

And this is the $10,000, *let it be remembered*, out of which it is said the appellants were deliberately *defrauded*. That, again, to use the rhetoric of counsel, "Mr. Peck steeped his lips in fraud, for the settled purpose of his heart was to pocket the $10,000! and then declare a forfeiture on the very first opportunity," etc.

Now mark the sequel. It is not pretended that one dollar of taxes or purchase money was ever paid *after* the sum for which they were, at that time (in 1859), *in arrear* for the taxes, assessments and charges of tax sales and interest due on the land—was paid *on the contract*.

Thus it is: that the payment of the $10,000 made upon the contract, according to the obligations originally assumed by appellants, was first made the pretext with Peck to obtain a *first* postponement, and after *eighteen months longer time*, this *delay* of time was converted into the opportunity to plunder the land, and appropriate the rents without any return or account whatsoever during the whole interim.

Again, the decree in the State court, (Record, page 11) shows that the appellants, *being in "all things in default"* —that Hansbrough having become *insolvent*—a stranger, named Ryerson (not brought into this case by appellants),

claimed *all the improvements* and buildings erected on the land, as a purchaser, from both *Harden* and *Hansbrough;* and, under that claim, insisted upon the exclusive ownership and property of the buildings, for which these same parties, *Hansbrough* and *Harden*, are now claiming compensation against Mr. Peck. If at all material, I would institute an inquiry to ascertain what had become of Mr. Hansbrough's *creditors*, *under his assignment;* and what of the *owner*, *by purchase*, (Martin Ryerson) against whom the State court issued and decreed a perpetual injunction.

From the very plain showing of facts, as they appear on appellants' own record, four things are clearly manifest.

1st. That by the purchase of appellants, the appellee was deprived of all control over the premises for more than *four years*, during which time he could avail himself of no other opportunity to make a re-sale, or dispose of the property.

2d. That the *bargain*, turning out, in the estimation of appellants, to be *unprofitable in their hands*, they resolved to abandon the contract in 1861.

3rd. That after appellee had granted a delay, after their first default to pay taxes, etc., and purchase money, in 1859, they resorted to the contrivance of *a sale of the improvements* in 1861, to a stranger named Ryerson, by whom the buildings were to be removed, as his chattels, from the land, including the two buildings purchased of Mr. Peck himself, when the appellants took possession. And,

4th. Mr. Peck was *driven* to his *election* under the contract, by the fraudulent conduct of appellants, when he went into the State courts and obtained a decree to pre-

vent the spoliation of his property, and to declare a forfeiture, instead of pursuing appellants or relying on their performance of the contract.

In view, therefore, of these things, may I not ask, if such indeed are the "improvident and innocent purchasers, whose ruin is wrought by Shylocks, without pity," for whom the learned counsel asks this court to overthrow the clearest and plainest maxims of modern equity jurisprudence?

Having now concluded my reply to the "theory" of the learned counsel, as applied to the character of the whole transaction, and especially as that theory bears on the character of my client, I proceed briefly to the

Law of this Case.

In what I shall have to say under this head, I rely upon the argument *I have already filed*, trusting that the court will do me the honor to glance over its points and authorities, which, according to my ability, I have fully discussed. I will, in this brief, confine myself to a reply to such of the positions taken up in the last argument of appellants as, though scarcely new, appear *differently presented.*

These positions, briefly condensed, seem to be,

1st. That by a general demurrer to a bill in equity we can not take advantage of a former decree between the same parties, unless it is *specially pleaded.*

2d. That the decree in the State court does not (to use the language of the counsel), "touch one of the points "raised by the present bill."

3d. That usury appears in the contract, which they are entitled to recover back.

4th. That money paid on an executory contract, in pursuance of its terms and obligations, can be *recovered back* by a *party himself in default*, although, (as in this case), the other party is driven, by such *default*, to declare a forfeiture, and a court of competent jurisdiction has annulled the contract by decree, declaring that the said appellants are forever debarred from having any estate, right, possession, or interest under the contract which they violated.

I.

It has been long the established rule of the courts, that a general demurrer will lie, when a case is so stated on the face of the bill as to show that a plaintiff has no interest in the subject matter, *or no proper title to institute a suit concerning it, whenever the objection is apparent on the face of the bill.*

The cases are numerous and authentic in which the questions arising under the *statute of frauds*, as in case of *parol* agreements concerning land — and the statute of limitations as a bar to proceedings in equity—have been expressly raised and decided only upon a general demurrer and the bill dismissed for want of equity.

Story's Eq. Pleading, § 503.
Humbert v. *Rector, &c., Trinity Church*, 7 Paige, 195.
Van Hook v. *Whitlock*, *ibid*, 373.
Humbert v. *Trinity Church*, 24 Wend. 604.
Hevenden v. *Lamerley*, 2 Sch. & Lef., 637.
Homer v. *Peck*, 6 Simonds, 51.

In the case 7 Paige, 195, cited above, the chancellor, stating the doubt that formerly existed as to this point,

says: "But it now seems to be settled, that if it appears "on the face of the bill that the suit is barred by lapse of "time, the defendant may demur, and that if the case is "within any of the exceptions of the statute, the com- "plainant must state the fact in his bill" (7 Paige, 198, and cites several authorities).

So, also, it is settled, that if a bill be to set aside a judgment upon the same cause of action, as obtained against conscience, or in fraud, unless it contain allegations of fact impeaching the verdict, and require an answer, the objection should be taken by *demurrer* rather than by *plea*.

Story's Eq. Pleading, § 781.

The practice, of late years, has been so generally understood, in our Federal as well as State courts, that I suppose references on this point would be useless and unnecessary.

II.

The decree in the State court does substantially embrace every point to which appellants' argument calls attention. "It is the constant aim of courts of equity," Judge STORY says (Story's Eq. Pleading, § 72), "to do complete justice, "by deciding upon and settling the rights of all persons "interested in the subject matter of the suit, so that *future* "*litigation* may be prevented. Hence, the common expres- "sion, that courts of justice delight to do justice, and not "by halves."

The learned counsel resorts to *verbal* criticisms, for the purpose of showing that because NOTHING IS SAID in the decree of the *value* of the improvements on the land, nor of the *payments made under the contract*, that the rights of

these same parties are not settled, and only partial justice has been done, still leaving open all these questions to the present litigation.

I can not be deceived, in supposing that this criticism, on the language of the decree in the State court, is trifling with the substantial justice of this case!

On turning to the copy of the decree of the State court, in printed record, pp. 10 and 11, this court will find, in the language and recitals of that decree, the facts stated that the appellants appeared in that court, by counsel, and that the cause was heard "on bill, answer, exhibits, proof, "and the *depositions of witnesses.*"

And further, the facts upon which that decree was based, are stated to be the contract, the *default of appellants*, the purchase by Ryerson of the buildings, the claim set up of ownership, and, finally, the conclusive judgment of that court as to the whole *subject matter*.

The presumption, at least, arises, that if the parties did not litigate every matter of right in controversy between them, they *could* and *should* have done so; and therefore, according to all the cases, the decree must be regarded as final and conclusive.

The learned counsel, in reviewing my cases cited in the former brief, has been careful to avoid the cases *Hopkins* v. *Lee*, 6 *Wheat.*, 109, *Mariot* v. *Hampton*, 7 *Durn. & East*, 265, *Gray* v. *Gellelan*, 15 Ills., 456, *Dalton* v. *Bentley*, *ibid*, 421, 12 Wend., 399, and a number of other citations, which not only decide that "the same points must appear "to have been in issue," but also all questions *which could have been put in issue*, are also closed to the parties against any opening to future litigation, since the policy of the law is that there should be an end to litigation.

III.

It is said that usurious interest was charged in the payments to be made by the contract, the smaller installments of the contract being all calculated with interest at 10 per cent. on the larger sum, or final payment, of $90,300, to be made in 1861!

Suppose this were true, there still remains the objection before made, "that the parties appellant had not even paid "the *principal* of the debt, and that there was still due "from them a large balance of *both principal and interest.*"

To obtain equity, let them first do equity, by offering lawful principal and interest, a thing disclaimed and *inconsistent* with the entire theory of their case!

But if the court pleases, I omitted perhaps the most *important* and conclusive objection to this claim of usury (had it ever existed) in my former argument of this case.

Under the law of 1857, to which the counsel refers as in force to govern the terms of the contract, the courts of Illinois decide "that it is the settled law of this State that "usury voluntarily paid under the law of 1857, can-"not be recovered back."

Ramsey v. *Perley*, 34 Ills., 508;
Hadden v. *Inness*, 24 Ills., 381;
Dooley v. *Stepp*, 26 Ills., 86;
Lucas v. *Spencer*, 27 Ills., 15;
Tompkins v. *Hill*, 28 Ills., 519;
Perkins v. *Clement*, 29 Ills., 194.

So, upon the laws of the State, *this pretence*, that usury *was paid*, and may be recovered back in equity against the rule which requires a tender of all that is legally due, may be finally considered at rest in this case.

IV.

But one question remains, that money paid by a party who is in default on a contract, can be recovered back, although in consequence of his default the other party has been driven to declare a forfeiture, according to its provisions.

And the learned counsel places himself, in his former argument, upon the ground that there had been what is known in law as a *rescission* of the *contract by Mr. Peck*, so as to place the parties "*in statu quo ante pactionem.*"

I showed in my former argument (page 31), how legally *impossible*, if not absurd, it was for parties in *default themselves*, who, having repudiated the contract which they refused to fulfill—having entered into the enjoyment and possession of the property, which they refused to surrender, until, in consequence of their own defaults, the courts of equity in the State had condemned them—having done all this, to insist, in their own wrong, that the benefits or rights of a legal performance, or rescission of a contract, could belong to them.

I will now cite two later cases decided in Illinois, in the 34th volume of our Reports, issued since my last argument was written.

The case of *Milner* v. *Willard*, 34 Ills., 41, decides that a failure on a contract for the purchase of land (and that, too, a cut-throat contract to pay within the *time stipulated*), where time (as in this case) is expressly made, or may become, of the essence of the contract, the party in default is debarred in equity of all relief whatever.

So it is also settled in 34 Ills., 468, *Sanford* v. *Ewing*, that in case of the owner, or vendor, being in default, if the purchaser means "to *rescind*," he must restore the property in possession.

The Conclusion and Herein of the $10,000.

I can not conclude this argument without offering the tribute of my sincere admiration to the learned counsel. By his eloquence alone he has imparted to the *bad faith* of the appellants an "air of offended innocence!" It reminds one of that celebrated thief, Jack Sheppard, who, breaking into a man's house, was found by the owner with the spoils of his depredation, calmly proposed a stipulation that if the proprietor would "pay *him back*" for his loss of time and risk of detection and punishment, in contriving the plan of the robbery, the owner might escape from his hands with impunity.

The appellants, in this last argument, coolly claim to recover back, under the *Fourth Question* of the counsel, $10,000, obtained, it is said, from them "*by the fraud of* "*Peck, in November*, 1859."

It does not seem to occur to them, in this demand, that they first entered into binding stipulations with Peck by contract, and obtained thereby possession of Peck's property for years; that they allowed the payments to run in arrear, and the $10,000 to accumulate for taxes and assessments, which Mr. Peck had to advance on the land to save it from the hands of purchasers at tax sales.

It is not sufficient, it would seem, that when finally pressed, in 1859, they at length consented to pay these taxes, on condition of still further time being given to them to meet other obligations equally sacred, while they could keep in possession, collecting the rents and profits. But that they still neglected to pay any *subsequent* taxes or *purchase money* on the land.

It does not seem enough, that at length, concluding no change would take place to bring up the land to specula-

tive prices again, they resolved to *abandon the contract absolutely*—that, for this purpose, they fraudulently resorted to the common contrivance of a sale to a *third person* (Ryerson), to devastate and appropriate the property of the honest creditor.

But now, at the conclusion of the whole matter, when the scheme had been baffled by the courts, and the property of the creditor secured from their grasp, these appellants, with the courage and more than boldness of the outlaw, demand back even the modicum of the purchase money and taxes, which have been paid, before they will allow Mr. Peck to escape from their hands with impunity.

Is not this the true and only interpretation of the cool and deliberate demand, that the $10,000, paid on the contract which they abandoned, shall now be paid back to them?

Legally and equitably considered, the promise to grant further delay or forbearance, "was never even reduced to any writing." It was money justly due, and in arrear at the time it was paid. It had no new consideration; it was based solely upon the obligations of the contract. Surely no citation of authority before this tribunal can be necessary to show that a promise so made was never of any binding force or effect. Every elementary work on contracts contains the doctrine, that new promises to pay debts already due upon forbearance, to sue or give time, are not of any legal force for want of consideration.

But neither is the appellee seeking the protection of this principle! It appears on this Record that such has never been claimed. The fact only appears, that for more than eighteen months after *the delay* was conceded, when more than $20,000 more of purchase money and taxes had ac-

crued on the land, that the appellee took no step to enforce the contract until the attempt was made to strip the property of the improvements. The success of such attempt would have annihilated all his security for past as well as future payments. Hansbrough had declared his insolvency, and Hansbrough and Harden had sold the wooden tenements to a stranger; and, besides, they were non-residents themselves, being citizens of Kentucky.

It was only when these facts appear on the Record that *then, and not until then*, is the appellee found appealing to the courts against them. His measures appear by way of *defence*, and not of *aggression*.

The necessity and *good faith* of his entire conduct, are all confirmed by the most solemn judgments and decrees of the State courts. His rights have been recognized and established, and the irrevocable condemnation of the appellants pronounced.

If the learned counsel cannot *succeed in this case*, I remind him in his own language, "that the eternal senti-"ment of right and justice which forms an ineradicable "instinct in every human heart," cannot be perverted or misled even by the most gifted of the children of men.

I recall to his classic memories the celebrated reply of that great jurisconsult, PAPINIAN, when asked by the emperor CARACALLA to justify one of his most cruel and unnatural homicides, "It is easier to commit, than to justify a parricide."

THOS. HOYNE,
of Counsel for Appellee.